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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
Federal Communications Commission
Washington, D.C. 20554

In re applications of

MOBILE TELECOMMUNICATIONS TECHNOLOGIES CORPORATION — MSD-90-12

Request for a Declaratory Ruling Concerning Preemption of State Regulation for Nationwide and Multistate Paging Service on Frequency 931.4375 MHz

and

U.S. CENTRAL, INC. — MSD-90-3

Petition for Declaratory Ruling on the Need to Preempt State Entry Regulation for Interstate Radio Common Carrier Service

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1991; Released: April 8, 1991

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On April 26, 1990, Mobile Telecommunication Technologies Corporation (MTel) requested a declaratory ruling that the nationwide and multistate wide-area paging service it proposes on frequency 931.4375 MHz is jurisdictionally interstate in nature and, therefore, subject solely to regulation by this Commission. In response to MTel's *Request for Declaratory Ruling* (Request), the Commission issued Public Notice No. DA 90-704 (released May 14, 1990) seeking comments from interested parties.

2. Oppositions to MTel's Request were filed by PacTel Paging, Inc. (PacTel), Southeastern RCC Association (SERCCA), and BellSouth Corporation (BellSouth). Comments on MTel's declaratory ruling request were submitted by Paging Network, Inc. (PageNet), USA Mobile Communications, Inc. II (USA Mobile), the National Aeronautics and Space Administration (NASA)[1], U.S. Central, Inc. (U.S. Central), Metromedia Paging Services, Inc. (MPS), the National Association of Regulatory Utility Commissioners (NARUC) and the Public Utilities Commission of the State of California. MTel filed a reply.[2]

3. On February 24, 1988, U.S. Central filed a petition for declaratory ruling asking the Commission to confirm that federal law preempts state entry regulation of radio common carriers providing interstate paging services. For the reasons stated below, U.S. Central's petition is dismissed and MTel's petition is granted to the extent indicated herein.

II. CONTENTIONS

4. In its request, MTel states that through its subsidiary, SkyTel, it currently provides nationwide paging service on the designated nationwide frequency 931.9375 MHz. [3] MTel also states that it has Commission authorization to provide paging service on frequency 931.4375 MHz in a substantial number of cities and that it plans to use this frequency to handle the growing demand in nationwide paging. According to MTel, its proposed service on 931.4375 MHz would be integrated with service on the 931.9375 MHz frequency so that the nature and breadth of the services would be parallel. MTel claims that this arrangement would allow SkyTel to accommodate growth of its nationwide paging service as well as offer the flexibility to provide regional, multi-state service on 931.4375 MHz.[4] MTel describes its regional service as one in which all traffic would be transmitted on a simulcast basis and routed via interstate 800 service to the same switch now serving the nationwide simulcast system. The traffic would then be distributed by satellite to transmitters in at least seven states. According to MTel, this system "will not, and cannot, know where the recipient of the page will happen to be located." Request at 2. Thus, it states that it is possible for a call placed in one state to terminate with a paging subscriber in that same state, even though the message is simultaneously transmitted to transmitters and broadcast over a multistate region. However, MTel notes that "local" paging service only (that is, calls that originate and terminate within a single state) will not be offered as a discrete service by SkyTel.

5. In support of its Request, MTel cites the Commission's preemption of state regulation for nationwide paging. [5] There, the Commission determined that because paging networks are nationwide in scope and predominantly transmit interstate messages, state regulation over technical standards, entry and rate regulation should be preempted. Because SkyTel intends that its service be interstate in nature, MTel argues that Commission preemption of state regulation is equally applicable for its proposed nationwide and multistate wide area paging service operating on 931.4375 MHz. MTel also maintains that the courts have consistently held that the Commission may preempt state regulation that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress," citing *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 369 (1986).

6. PageNet, USA Mobile, MPS, and U.S. Central are concerned that MTel may be given special treatment regarding its proposed service. As a direct competitor of SkyTel, PageNet's position is that the Commission should grant the preemption relief MTel seeks on the condition that identical FCC regulatory treatment be afforded to PageNet and similar regional paging companies. PageNet agrees with MTel that it is in the public interest for MTel and other parties competing with it to avoid state regulation in their efforts to regionalize paging service. PageNet claims that the cost of meeting applicable state entry requirements is a significant factor which must be considered in every entry decision made by it. These costs, PageNet maintains, are ultimately reflected in higher prices to consumers. For its part, USA Mobile believes that MTel is seeking an unfair competitive advantage over other regional and paging operators that offer nationwide service on frequencies not specifically allocated for nationwide service. USA Mobile contends that any Commission preemption should not be limited to MTel's network

but should include all *de facto* regional and nationwide paging networks. U.S. Central agrees that the record supports grant of MTel's request as long as the Commission's ruling applies to all *de facto* regional and nationwide paging operating companies. According to U.S. Central, the preemption of predominantly interstate paging services is required if the Commission is to promote genuine competition in regional and nationwide paging services.

7. SERCCA, MPS, PacTel and NARUC argue that the Request should be denied because MTel is seeking to reallocate frequency 931.4375 MHz as a fourth nationwide paging channel. SERCCA maintains that such an action requires a Rule Making proceeding and cannot be accomplished through a declaratory ruling. MPS argues that the Commission has already decided that it cannot preempt state regulation of paging channels allocated for non-nationwide use.[6] According to MPS, MTel's filing is a request for a reallocation of a frequency which cannot be granted. Alternatively, MPS suggests that the Commission use MTel's Request to initiate a Rule Making proceeding to grant all public land mobile service licensees the option of operating on a non-common carrier basis. For its part, PacTel contends that there is no public policy reason to support a reallocation of another channel for nationwide paging. PacTel asserts that there has been so little demand for nationwide paging services generally that one carrier surrendered its nationwide license, another delayed building its system, and the Commission has even considered reallocating the surrendered channel for other services. NARUC argues that a petition for declaratory ruling is not the proper proceeding in which to implement a reallocation of spectrum. NARUC believes that the use of a local paging frequency for a nationwide paging service represents a deviation from the Commission's rules. NARUC contends that until MTel presents evidence showing that nationwide paging services are operating at or near capacity on all nationwide frequencies, it cannot support MTel's request. NARUC believes that MTel should request a waiver of Section 22.501(p) of the rules.[7]

8. BellSouth also opposes the Request, arguing that MTel fails to meet the standards for federal preemption established by the Supreme Court in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986). BellSouth challenges MTel's apparent reliance on the exceptions set forth in that decision. MTel's support for its claim that the separation of interstate and intrastate components of the service is not possible, BellSouth contends, is inadequate. BellSouth uses a description of MTel's system from another Commission proceeding to demonstrate that MTel is able to separate its intrastate and interstate communications. [8]

9. In its reply, MTel states that it is not seeking to reallocate local paging frequencies to nationwide paging without the required waiver of the rules or without a Rule Making. Instead, MTel maintains that the 931.4375 MHz paging licenses it holds are not reserved exclusively for local services and that the frequency is exclusively used for wide-area interstate services by many carriers today. Nowhere in Commission rules, MTel contends, is there language which designates 931.4375 MHz for only local transmission paging. Therefore, MTel maintains, neither a waiver of the Commission's rules nor a petition for Rule Making is required.[9] Because it seeks only clarification of Commission policies, MTel claims that a declaratory ruling is the proper vehicle.

10. Moreover, MTel believes that the relief it requests is consistent with Commission policies regarding nationwide paging. MTel asserts that its proposed service is jurisdictionally interstate in that it does not now offer nor does it plan to offer a local intrastate paging service. While MTel acknowledges that a call placed in one state could terminate on a pager in that same state, this delivery would be strictly unintended and incidental to MTel's multistate functions and is beyond its control. The technical characteristics of its system, MTel explains, prohibits it from knowing where the recipient of the page is located. MTel's proposed system would transmit paging traffic over a multistate region via the same switch that now serves the nationwide simulcast system. This traffic is distributed by satellite to transmitters in at least seven states simultaneously. Thus, MTel explains, the system is "blind" as to the location of the person receiving the page.

11. Furthermore, MTel claims that its request does not seek an unnecessary or illegal preemption of state regulation. In the *Third Report and Order*, MTel avers, the Commission defined nationwide paging as "an interstate service which although divisible into three different technical components, functions as an integrated communications system and, therefore must be viewed as a whole for regulatory purposes." 97 F.C.C. 2d at 908. MTel concludes that the Commission's record on nationwide paging generally demonstrates that the exercise of exclusively federal jurisdiction over MTel's nationwide service is both appropriate and necessary. The Communications Act, MTel argues, gives the Commission clear authority to preempt state regulation of nationwide paging where state regulation "stands as an obstacle to the accomplishment and execution of the full objectives of Congress," citing *Louisiana Public Service Commission v. FCC*, 476 U.S. at 369.

III. DISCUSSION

12. The Commission created the nationwide paging service in 1983 to permit paging subscribers to receive pages outside of their local service areas. It described the service as "predominately interstate service, which may also address intrastate demands." 93 F.C.C. 2d at 921. The Commission preempted state regulation of nationwide paging with respect to entry, technical standards, and rate regulation. *Id.* This was done to ensure that paging operators would have access to full nationwide coverage and that state entry regulation would not delay implementation of the new service. The Commission also determined that state rate regulation must be preempted "where, as here, it is technically and practically impossible to separate [interstate and intrastate] communications for tariff purposes." 93 F.C.C. 2d at 922. That determination was upheld by the Court of Appeals of the District of Columbia.[10]

13. MTel was one of the three original licensees of nationwide paging service[11] and has received authorization to provide nationwide simulcast paging service on frequency 931.9375 MHz. MTel states that it is currently providing nationwide paging service to over 62,000 pagers in 150 markets, and holds Commission authorizations for 931.4375 MHz in over 200 cities covering over 100 major markets. [12] It maintains that it needs additional spectrum to continue to add new customers without causing degradation in its service quality. It also contends that it cannot develop new types of service, like alphanumeric

paging, without additional spectrum to supplement its nationwide paging service. MTel argues that the most effective, efficient and expeditious solution to its spectrum needs is to use frequency 931.4375 MHz to augment its nationwide service. MTel seeks confirmation that it may use this frequency for which it has already obtained licenses throughout substantially all of the United States to expand its service.

14. The Commission's rules do not limit use of frequency 931.4375 MHz exclusively to local paging, nor do the rules prohibit use of the frequency for nationwide paging service. MTel's need for additional nationwide paging spectrum may be satisfied by application of a paging frequency for which it is already licensed in some 200 cities. The commenters' arguments that MTel is seeking a *de facto* reallocation of spectrum through the declaratory ruling process are without merit. Frequency 931.4375 MHz is not reserved for local paging. Moreover, simply because MTel is using the channel for nationwide service does not reallocate the channel for nationwide service only. Unlike the three nationwide paging channels, other applicants remain free to apply for frequency 931.4375 MHz in areas of the country not licensed to MTel. In addition, either MTel or a successor licensee remains free to return to providing only local paging using this channel, subject, of course, to state regulatory requirements, if any. Therefore, there is no need for MTel to request a waiver of the Commission's rules or submit a petition for Rule Making.[13]

15. MTel's proposed expansion of its paging network to provide broader national coverage represents an enhancement over local paging service, for which subscribers pay a substantial premium. MTel asserts that its proposed integration of frequency 931.4375 MHz with nationwide services on frequency 931.9375 MHz is inherently an interstate paging offering that is not intended to be a substitute for intrastate paging. Indeed, no commenting party refutes this statement. Its national paging service may permit the origination and termination of some intrastate traffic, but its system as designed does not permit the carrier to ascertain when or how frequently intrastate pages occur.[14] MTel notes that the cost of its service -- $25 to $50 per month more than local intrastate paging service -- makes it unlikely that a customer would use the service for anything but incidental local paging. Pages sent on the system are transmitted at once in all states in which the system operates. It is well established that the Commission has end-to-end jurisdiction over interstate communications services. *See Ambassador, Inc. V. FCC*, 325 U.S. 317 (1945). It is also well-recognized that where interstate and intrastate services are technically and practically infeasible to separate, the Commission may exercise its jurisdiction. *See Louisiana Public Service Commission v. FCC*, 476 U.S. at 375 n. 4 and *California v. FCC*, 567 F.2d 84, 86 (D.C. Cir. 1977), *cert denied*, 434 U.S. 1010 (1978). Under the exception to Section 2(b)(1) of the Communications Act, [15] the Commission is limited to preempting state regulations that would "necessarily thwart or impede" Commission goals. *See People of the State of California v. FCC*, 905 F.2d 1217, 1240 (9th Cir. 1990), and *NARUC v. FCC*, 880 F.2d 422 (D.C. Cir. 1989). We find that the interstate and intrastate components of MTel's proposed nationwide paging service are technically and practically infeasible to separate and that any state regulations that would negate the federal policy of allowing carriers to use existing authorized frequencies to augment nationwide or regional paging service are subject to federal jurisdiction. Interstate paging service is exclusively within the jurisdiction of the Commission. State restrictions that impede the provision of MTel's interstate paging service are inconsistent with Commission policies for interstate communications services. [16]

16. This declaratory ruling is based on the particular facts presented by MTel. As with any declaratory ruling, to the extent that other parties present factual circumstances similar to the ones presented, this declaratory ruling would apply to those parties as well. We do not rule on U.S. Central's request for a declaratory ruling that federal law preempts state entry regulation of radio common carriers providing interstate paging services. While the decision we issue here may provide U.S. Central the guidance it seeks, we decline to rule on its petition because it has not provided particular factual circumstances upon which we can make a determination.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's rules, that the request for declaratory ruling filed by Mobile Telecommunication Technologies Corporation (MSD 90-12) IS GRANTED to the extent indicated herein.

18. IT IS ALSO ORDERED, that the petition for declaratory ruling filed by U.S. Central, Inc. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] NASA, a user of Skytel's service, submitted a letter of support for expansion of MTel's nationwide paging service.

[2] After the comment period closed, the staff of the Public Utilities Commission of the State of California submitted to the Commission an informal opinion from it to Skytel, Inc. (Skytel), a subsidiary of MTel. The letter gives the opinion that, notwithstanding the inseparability of interstate and intrastate traffic, Skytel is required to apply for a Certificate of Public Convenience and Necessity since there is a possibility that intrastate pages can be completed with Skytel's system.

[3] The Commission set aside three frequencies, including 931.9375, for the exclusive use of nationwide paging service in Amendments of Parts 2 and 22 of the Commission's Rules to Allocate Spectrum in the 928-941 MHz Band and to Establish Other Rules, Policies, and Procedures for One-Way Paging Stations in the Domestic Public Land Mobile Radio Service, 89 F.C.C. 2d 1337 (1982) (*First Report and Order), recon.* 93 F.C.C. 2d 908 (1983); 97 F.C.C. 2d 900, 909 (1984) (*Third Report and Order)* (collectively referred to as *Nationwide Paging* orders). Twenty-seven other 900 MHz frequencies are allocated to one-way paging service.

[4] According to MTel, SkyTel's paging system using 931.9375 MHz now serves over 56,000 pagers in more than 150 markets. A recently completed load study, MTel states, reveals that the grade of service was .53 in January and .59 in February, 1990,

demonstrating a need for another channel. MTel argues that if allowed to continue, this heavy loading will not only further degrade existing service but will severely impede growth and the development of new services.

[5] *Nationwide Paging* orders, *supra* note 3.

[6] In the *Nationwide Paging* proceeding the Commission explicitly declined to rule on *de facto* nationwide services on non-nationwide frequencies, noting that

> [s]uch issues are beyond the scope of the instant proceeding. To the extent that nationwide service is established in the future by *de facto* nationwide paging systems, we will entertain petitions for declaratory ruling on the preemption question.

Nationwide Paging, 97 F.C.C. 2d at 909 n.31 (*Third Report and Order*).

[7] Section 22.501(p)(1) gives the frequencies that may be assigned to base stations of communication common carriers for use exclusively in providing a one-way signaling service.

[8] In *National Satellite Paging, Inc.*, 2 FCC Rcd, 3185, 3186 (1987), MTel described its system as one in which "local distribution" of a page "is routed directly from the [Network Interface Unit] to the local network operator's distribution system."

[9] MTel nevertheless asserts that a waiver would be justified in this case, citing Section 22.19(a)(ii) of the Commission's rules. A waiver is justified where "the unique facts and circumstances of a particular case render the application of the rule inequitable, unduly burdensome or otherwise contrary to the public interest." 47 C.F.R. Section 22.19(a)(ii).

[10] *First Report and Order, recon., supra* note 4, *aff'd mem., NARUC v. FCC*, No. 83-1485 (D.C. Cir. 1984).

[11] Skytel was formerly named National Satellite Paging, Inc. CyberTel Beep USA Nationwide Paging Limited Partnership was awarded the initial nationwide paging license for 931.8875 MHz. It later forfeited this license and it was reassigned to RB Management Services, Inc. The other nationwide license is currently held by Motorola.

[12] According to MTel, it added some 6,000 paging units in the two months following submission of its April 26, 1990 Request.

[13] The suggestion by MPS that the Commission allow public land mobile service licensees the option of providing paging service on a non-common carrier basis is a matter beyond the scope of this proceeding and therefore will not be considered in this proceeding.

[14] In response to BellSouth's allegation that MTel described an earlier proposed system as capable of separating local paging traffic (*see* note 7 *supra*), MTel replies that the design of its current service does not have the capability of distinguishing between interstate and local traffic. This declaratory ruling does not address a system which is capable of readily distinguishing between interstate and local paging services.

[15] Section 2(b)(1) of the Communications Act of 1934, denies federal jurisdiction "with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service by wire or radio of any carrier." 47 U.S.C. Section 152(b)(1).

[16] Under the Communications Act, states may not engage in tariff regulation of interstate services. The Act grants this Commission exclusive authority to regulate the charges and services of interstate common carriers. *See* 47 U.S.C. Sections 201-205 and Nationwide Paging, 97 F.C.C. 2d at 906 n. 16 (Third Report and Order). In addition, it would be inconsistent with federal policies for a state public utility commission to prohibit altogether location and operation of a transmitter within the state's borders. Furthermore, a state requirement that a nationwide paging service provider obtain a certificate of public convenience and necessity prior to provision of interstate service would also conflict with exclusive federal authority to regulate interstate communications services notwithstanding the fact that some incidental intrastate services are provided which cannot be specifically identified by the carrier. *See, e.g., Norlight*, 2 FCC Rcd 132 (1987), aff'd, 2 FCC 2d 5167 (1987). This declaratory ruling does not address state environmental, historical preservation or zoning regulations as they apply to the specific location of individual antenna towers.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

PAUL KELLEY d/b/a AMERICAN TELTRONIX File No. 25495-CD-P/L-1-89

For facilities in the
Public Land Mobile Service
at Mountaintop, Sybertsville,
Milwaukee, Strousburg,
Summit Lawn, and Philadelphia,
Pennsylvania; and Cedar Grove,
New Jersey

MEMORANDUM OPINION AND ORDER

Adopted: March 28, 1991; Released: April 8, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Mobilfone of Northeast Pennsylvania, Inc. (Mobilfone) has filed a petition requesting that we "dismiss or deny, or in the alternative, hold in abeyance pending further Commission action" the above-captioned application filed by Paul Kelley d/b/a American Teletronix (AMTEL). Mobilfone contends that the application is defective because it has failed to disclose that AMTEL is involved in federal and state proceedings concerning its conduct as a Commission licensee. Mobilfone also contends that the proposal contained in the application does not comport with the mandate of the Communications Act of 1934 (the Act) requiring efficient use of the radio spectrum.[1] For the reasons discussed below, we deny Mobilfone's petition.

II. DISCUSSION

2. *Nondisclosure.* Mobilfone says that it has accused AMTEL in proceedings pending before this Commission and the Pennsylvania Public Utilities Commission (PUC) of unlawfully using a private radio station for the provision of common carrier service. Disclosure of these proceedings, contends Mobilfone, is called for in question 14 of FCC Form 401 (Application) and question 7 of FCC Form 430 (Licensee Qualification Report). Because the FCC Forms 401 and 430 filed by AMTEL do not mention these two proceedings, Mobilfone submits that AMTEL's application is defective, and AMTEL is in violation of Sections 1.65 and 22.13(a)(5) of the rules. Consequently, Mobilfone concludes that AMTEL's fitness to be a radio common carrier licensee is in question.

3. The record indicates that Mobilfone's allegation that AMTEL is subject to state regulation because it is providing common carrier service with its private radio station has been rejected on three occasions: (1) the Private Radio Bureau (PRB) issued a *Declaratory Ruling* (*Ruling*) finding that AMTEL's operation of its private land mobile system complies with the provisions of Section 331(c) of the Act, and, thus is not subject to state entry and rate regulation;[2] (2) the Commission issued a *Memorandum Opinion and Order* (*Order*), denying Mobilfone's petition for reconsideration of PRB's *Ruling* ;[3] and (3) the PUC issued an *Initial Decision* (*Decision*) dismissing Mobilfone's complaint against AMTEL because of the PUC's lack of jurisdiction over AMTEL's system.[4]

4. Sections 1.65 and 22.13(a)(5) of the rules charge each applicant with responsibility for keeping its application accurate and complete. Question 14 of Form 401 and question 7(a) of Form 430 ask the applicant if it has had any FCC authorization revoked or denied. Two additional subsections of question 7 of Form 430 also ask if the applicant has ever been found guilty of monopolizing radio communication or convicted of a felony.[5] Neither the Application nor the Licensee Qualification Report requires that an applicant identify the types of litigation identified by Mobilfone. Consequently, Mobilfone has failed to establish that AMTEL has not complied fully with the Commission's rules.

5. *Inefficient use of spectrum.* Mobilfone points out that Section 1 of the Act established the Commission "to make available to all the people of the United States a rapid, efficient . . . radio communication service . . . ." Inherent in this mandate, says Mobilfone, is the Commission's authority to require the efficient utilization of the radio spectrum. Mobilfone contends that although AMTEL claims it has proposed a wide-area paging system, it has, in fact, proposed three separate and discrete systems. Mobilfone submits that AMTEL's application for a common 900 MHz channel for these three unconnected systems represents an inefficient use of the radio spectrum and should be denied.

6. Section 22.501(p) of the rules provides that an applicant proposing to construct a 900 MHz one-way common carrier paging facility is free to request a specific channel. This rule provides, however, that the Commission is not bound by such requests. Applicants in this service often request a common channel for use at several transmitter locations whose service areas they anticipate will ultimately be part of one wide-area system. Spectrum permitting, these requests are routinely granted because we believe common frequency usage, in these situations, is spectrally efficient. Consequently, we find no merit to Mobilfone's allegation.

III. CONCLUSION

7. In summary, we find that Mobilfone has not alleged facts sufficient to raise a substantial and material question of fact that a grant of AMTEL's application would be prima facie inconsistent with the public interest, convenience and necessity. Mobilfone has failed to demonstrate that AMTEL's proposal violates either the rules or the Act. Therefore, we are denying its petition.

IV. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED that Mobilfone of Northeast Pennsylvania, Inc.'s petition IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] In addition, Mobilfone notes that AMTEL was in violation of Section 22.15(j)(8)(vi) of the rules because it failed to plot the locations of its proposed stations on a map with a scale of 1:250,000. AMTEL, pursuant to Section 22.23 of the rules, resolved this issue by providing the proper maps.

[2] Amerian Teltronix, 3 FCC Rcd 1091 (1988).

[3] American Teltronix, 3 FCC Rcd 5347 (1988).

[4] Mobilfone of Northeastern Pennsylvania, Inc. v. Paul Kelley d/b/a American Teltronix, No. C-871182 (Pennsylvania Public Utility Commission, issued December 1, 1988).

[5] Identical inquiries are contained in questions 15 and 16 of Form 401.

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Request of

CONTINENTAL ILLINOIS VENTURE CORPORATION — File No. MSD-91-4

For Declaratory Ruling Concerning
Section 310(b)(4) of the
Communications Act of 1934,
as amended

MEMORANDUM OPINION AND ORDER

Adopted: April 1, 1991; Released: April 8, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Continental Illinois Venture Corporation,[1] (Continental), pursuant to Section 1.2 of the rules, requests a declaratory ruling that its acquisition of Celutel Inc., (Celutel), the parent company of several cellular licensees,[2] even though Michael Kim (Kim), a non-United States citizen, serves as Chief Financial Officer of Continental (CFO), is not unlawful under Section 310(b)(4) of the Communications Act of 1934, as amended (the Act). It is apparent that control of the licensees by Kim is sufficiently remote so as to not adversely affect the public interest, and, therefore, we are issuing the declaratory ruling.

II. DISCUSSION

2. Kim neither owns nor votes shares of stock in Continental, is not involved in its day-to-day management, and is supervised by a Chairman and Board of Directors who are United States citizens. Continental also states that Kim will not have control of any Celutel licensees because he will not serve on Celutel's Board of Directors or be involved in its day-to-day operations or the operations of its Commission-licensed subsidiaries. In conclusion, Continental states that, after the proposed transfer of control, a Celutel subsidiary will continue to be the licensee and Continental will be separated from each of the licensees by at least one corporate level.

3. Under Section 310(b)(4) [3] of the Act, a station license may not be held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer . . . [is an] alien[] . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

4. By its express language, the benchmarks established in Section 310(b)(4) apply to entities, such as Continental, which directly or indirectly control licensees. The restrictions in Section 310(b)(4) reflect national security concerns and are designed to guard against foreign influence by limiting aliens' participation in certain domestic radio activities. *See Request for Declaratory Ruling Concerning the Citizenship Requirements of Sections 310 (b) (3) and (4) of the Communications Act of 1934, as amended*, (Wilner & Scheiner) 103 F.C.C.2d 511, 516-517 (1985), *on recon.*, 1 FCC Rcd 12 (1986). Nevertheless, the statute permits licensing of a corporation controlled by another corporation which employs an alien officer where it is not contrary to the public interest. In previous cases, the Commission has found that the public interest would not be adversely served where the alien officers had no control or supervision of the licensee corporations. *Xerox Corporation*, 74 F.C.C. 2d 471 (1979); *International Telephone and Telegraph Corp.*, 67 F.C.C. 2d 604 (1978).

5. In view of Continental's representation that Kim will have no control or management oversight of Celutel licensees or its subsidiaries, we cannot find that the alien participation in Continental would be inconsistent with the Act or the public interest.

III. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED that the request for declaratory ruling IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Continental is not itself a Commission licensee. It is a wholly-owned subsidiary of Continental Bank N.A., which in turn is a wholly-owned subsidiary of Continental Bank Corporation.

[2] Celutel through its subsidiaries, controls and operates Block A cellular systems in six Metropolitan Service Areas. Celutel has entered into an agreement with Continental by which Continental will receive a controlling interest in Celutel in exchange for $22.5 million. Continental will purchase from Celutel 22,500 shares of 18% Senior Convertible preferred stock and warrants, which, if exercised, would be converted into 891,520 shares of the company's Class A common stock. Upon exercise of the warrants, Continental will hold preferred stock and common stock amounting to 67.4% of the total voting power of Celutel.

[3] The Bureau analyzed the alien participation in this case under Section 310(b)(4) of the Act because Celutel itself does not hold licenses, but controls Commission licensees through its wholly-owned subsidiaries.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

VIDCOM MARKETING, INC. (Assignor) — File No. 51158-CM-AL-90

and

Donald E. Vanek and David J. Schneider (Assignees)

To assign MMDS license for Station WHC993, Thief River Falls, Minnesota

and

Application of Wild Rice Electric Cooperative — File No. 51320-CM-P-90

For MMDS station at Thief River Falls, Minnesota

MEMORANDUM OPINION AND ORDER

Adopted: April 2, 1991; Released: April 8, 1991

By the Chief, Domestic Facilities Division:

1. Before the Division for consideration are: (1) the above-captioned Application for Consent to Assignment of Radio Station License of Vidcom Marketing, Inc. ("Vidcom" or Assignor") and Donald E. Vanek ("Vanek") and David J. Schneider ("Schneider") ("Assignees"); (2) a petition to deny the assignment application filed by Wild Rice Electric Cooperative, Inc. ("Wild Rice" or "Petitioner"), an opposition to the petition and a reply; and (3) a request for reinstatement filed by Wild Rice.

BACKGROUND

2. Vidcom filed an application for authority to construct a new Multichannel Multipoint Distribution Service (MMDS) station on the F-group channels at Thief River Falls, Minnesota on September 8, 1983 (File No. 14944-CM-P-83). The application was granted, with a construction expiration date of July 29, 1985. On the last day of the construction period, Vidcom filed an application for extension of construction authorization (FCC Form 701) which was granted, extending the construction period to January 29, 1986. On January 29, 1986, Vidcom filed an FCC Form 436 (License to cover facilities constructed in accordance with construction authorization). On February 20, 1986, Vidcom was granted a license to operate station WHC993 (File No. 50076-CM-L-86).

3. Four years later, Vidcom filed the subject application for authority to assign the license for station WHC993 from Vidcom Marketing Inc. to Vanek and Schneider, a partnership. The application was accepted for filing on August 1, 1990.[1] Wild Rice filed a petition to deny the assignment application on August 24, 1990. Opposition and reply pleadings have been filed by Vidcom and Wild Rice, respectively.

4. On May 3, 1990 Wild Rice filed an application to construct an MMDS station on the F-group channels at Thief River Falls. The application was returned to the applicant on July 27, 1990 on the basis that the frequencies applied for were licensed to Vidcom, and therefore, were unavailable.

ARGUMENTS

5. Wild Rice opposes the grant of Vidcom's assignment application on the basis that Vidcom's construction authorization was automatically forfeited due to Vidcom's failure to construct the facility within the authorized construction period, despite contrary representations made in its license to cover. In support of its allegation, Wild Rice offers affidavits of Messrs. George Fish and C. Vern Cleven.

6. Mr. Fish, in his affidavit, attests that on August 16, 1990, after having reviewed Vidcom's application for the station WHC993 license, he personally inspected the site described in the application, in an accompanying lease agreement, and in the license issued to Vidcom on February 20, 1986. According to Mr. Fish, his inspection revealed no antenna structure nor any MMDS facility on the property described in these documents.[2] Mr. Cleven, in his affidavit, attests that he is the owner of the site described by Vidcom and inspected by Fish, and that a lease agreement he had entered into with Vidcom for the site was cancelled because Vidcom failed to commence construction of an MMDS facility on the property by October 15, 1985. Cleven attests further that Vidcom did not commence any construction after the October 15, 1985 deadline, nor did he and Vidcom enter into any subsequent agreement pertaining to lease of the property.

7. In light of the foregoing, Wild Rice concludes that Vidcom did not construct station WHC933 at the authorized site, and that its license was, therefore, forfeited. Consequently, explains Wild Rice, Vidcom no longer has an interest in the station WHC933, and therefore, it has no MMDS facility to assign.

8. Moreover, Wild Rice submits that, in view of the testimony provided by Messers. Fish and Cleven, Vidcom has willfully and deliberately misrepresented the construction status of station WHC993 to the Commission. This, says Wild Rice, further supports the forfeiture of Vidcom's license and denial of Vidcom's assignment application.

9. Finally, Wild Rice contends that Vidcom has also violated the public interest. Petitioner argues that Vidcom's failure to construct and operate the authorized MMDS facility and its failure to surrender its license for cancellation after the period of construction had lapsed effectively denied residents of the Thief River Falls area access to multichannel video services. By holding itself

out as a lawful MMDS licensee for the F-group channels in Thief River, Vidcom, surmises Wild Rice, assuredly discouraged others with a sincere interest in providing MMDS to this community from doing so. Consequently, says Wild Rice, the residents of the Thief River Falls area were denied MMDS video services, which in this case resulted in a particular hardship to this rural area where MMDS service is the only multichannel video service that is economically viable. For this and the other reasons set forth above, Wild Rice submits that the subject application should be denied.

DISCUSSION

10. Vidcom's construction authorization expressly provided that the construction authorization expired on January 29, 1986. The authorization, on its face, also contained the following express provision:

> . . . This permit shall be automatically forfeited if the facilities authorized herein are not ready for operation within the term of this permit . . .

At the time, this automatic forfeiture provision was specifically embodied in Section 21.44 of the Commission's Rules. [3]

11. Vidcom's construction deadline was January 29, 1986. Vanek admits not only that this deadline was not met, but also confirms Wild Rice's assertion that station WHC993 was never constructed. In addition, Vanek states that Vidcom's failure to proceed with construction was due to financing difficulties that arose for the project. Based upon these admissions and Vidcom's failure to comply with the terms and conditions of its authorization, we find the construction authorization issued to Vidcom was forfeited automatically on January 30, 1986, and the covering license issued on February 20, 1986 was null and void, *ab initio*.

12. In view of the automatic forfeiture requirement, we find that the subject assignment application must be denied because Vidcom is no longer the licensee, and thus has no interest in any radio facility to assign.

13. Neither Schneider, Vanek nor any of Vidcom's other former officers, directors, and shareholders[4] hold any other interests in any of the Commission's applicants or authorization holders. Their sole, communications ownership interest was in Vidcom, Inc. which has lost all of its former authorizations and ceased to exist. If at some future time, Vidcom or any of its principals seek to acquire either managerial or proprietary interests in any entity regulated by this Commission, the Commission, at that time, may designate for hearing the issue of Vidcom's or any of its principals fitness to be a Commission licensee. At that time, Vidcom will have the opportunity to demonstrate why grant would be in the public interest. *See* 47 U.S.C. Section 309.

14. In light of the foregoing, we are unable to conclude that the public interest would be served by a grant of the subject application.

15. Also, in view of the foregoing, we find the equities warrant reinstatement, *nunc pro tunc*, of the application filed by Wild Rice.

16. Accordingly, IT IS ORDERED, that the petition to deny filed by Wild Rice Electric Cooperative, Inc. IS GRANTED and the assignment application filed by Vidcom, Inc. IS DISMISSED.

17. IT IS ALSO ORDERED that the application filed by Wild Rice Cooperative is reinstated, *nunc pro tunc*, for further processing.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] Vanek, a shareholder in Vidcom Marketing, Inc., represents that the corporation was dissolved on September 15, 1989 and the assignment represents a "name change of license holder".

[2] The location is described as being 3 miles east and 2 1/2 miles south of Thief River Falls, Minnesota. Its geographical coordinates are listed as 40^0 05' 14" latitude and 96^0 05' 20" longitude. The antenna structure said to be located at the site is described as being 199 feet above ground level.

[3] In November, 1987, the Commission revised and renumbered many of the rule provisions contained in Part 21 of the Rules and adopted a one-step licensing procedure applicable to Domestic Public Fixed Radio Services authorized under Part 21 of the rules, including MMDS applications. To effectuate the one-step licensing scheme, the Commission directed the use of two new forms: (1) FCC Form 494, (Application for a New and Modified Microwave Radio station license under Part 21) and (2) FCC Form 494 A (Certification of Completion of Construction Under Part 21). These two new forms are used in lieu of former FCC Forms 435 and 436. Although the Commission authorized the use of new forms and modified the Part 21 rules to reflect the one-step licensing process, the requirement that a permittee complete construction within the specified construction period and certify to the Commission that construction has been completed and the station is operational was not changed. Those requirements, along with the automatic forfeiture provision, are still contained in Sections 21.43 and 21.44 of the Rules.

[4] David M. Olin (Vice President/Director); Deborah Ernest (Secretary/Director); Peggy Bergsnev (Treasurer/Director); Richard A. Quigley (Director); and Muriel D. Olin. *See* Common Carrier and Satellite Radio Licensee Qualification Report (FCC Form 430) file by Vidcom on March 28, 1985.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-93

In the Matter of

Amendment of Section 73.202(b), RM-7661
Table of Allotments,
FM Broadcast Stations.
(Ladysmith, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 27, 1991; Released: April 8, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition filed by Flambeau Broadcasting Company (petitioner) requesting the substitution of FM Channel 226A for Channel 224A at Ladysmith, Wisconsin. Petitioner also requests the modification of its license for Station WLDY-FM, Channel 224A, to specify operation on Channel 226A. Petitioner states its intention to file an application for Channel 226A.

2. In support of its request, petitioner states that changing from Channel 224A to Channel 226A would allow Station WLDY-FM to increase its power to six kilowatts. Additionally, petitioner claims that the substitution of channels will remove an existing grandfathered short-spacing situation between Station WLDY-FM and the co-channel allotments at Tomahawk and Neillsville, Wisconsin.

3. We believe the public interest would be served by proposing the substitution of Channel 226A for Channel 224A at Ladysmith, Wisconsin, and modifying the license of Station WLDY-FM at Ladysmith to specify operation on Channel 226A, as it would provide Ladysmith and the surrounding areas with improved service. Channel 226A can be allotted to Ladysmith in compliance with the minimum distance separation requirements of the Commission's Rules at the petitioner's specified site 8.9 kilometers (5.5 miles) east of the community.[1] Since Ladysmith is located within 320 kilometers (200 miles) of the U.S. - Canadian border, concurrence by the Canadian government has been requested.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ladysmith, Wisconsin	224A, 279C	226A, 279C[2]

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 30, 1991,** and reply comments on or before **June 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Denise B. Moline, Esquire
Broadcast Media Legal Services
P.O. Box 1667
Manassas Park, Virginia 22111

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 226A are 45-28-05 and 91-05-00.

[2] Channel 279C is the subject of a *Notice* which proposes reallotment of the channel from Ladysmith to Hallie, Wisconsin. *See* 6 FCC Rcd 111 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-126

In the Matter of

Amendment of Section 73.202(b), RM-7198
Table of Allotments,
FM Broadcast Stations.
(Livingston, Tennessee)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1991; Released: April 8, 1991

By the Acting Chief, Allocations Branch:

1. At the request of WLIV, Inc., licensee of Station WXKG(FM), Channel 240A, Livingston, Tennessee (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1731 (1990), proposing the substitution of Channel 240C3 for Channel 240A at Livingston, and modification of its authorization to specify operation on the higher powered channel. Petitioner filed supporting comments reaffirming its intention to modify Station WXKG(FM) to Class C3 facilities. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 240C3 for Channel 240A at Livingston, since it would provide Livingston with a wide coverage area FM service. Channel 240C3 can be allotted to Livingston in compliance with the Commission's minimum distance separation requirements at WXKG(FM)'s current licensed site.[1] As proposed, we will also modify petitioner's authorization for Station WXKG(FM) to specify operation on Channel 240C3 in accordance with the provisions of Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Livingston, Tennessee	240C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of WLIV, Inc. for Station WXKG(FM), Livingston, Tennessee, IS MODIFIED to specify operation on Channel 240C3, in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 240C3 at Livingston are North Latitude 36-22-28 and West Longitude 85-18-20. In the *Notice*, we stated that the Channel 240C3 allotment required a site restriction to avoid a short spacing to Station WSEK(FM), Channel 241C2, at Somerset, Kentucky. Since that time the Commission has issued a *Memorandum Opinion and Order* in MM Docket No. 88-31, 5 FCC Rcd 927 (1990), substituting Channel 246C2 for Channel 244A, in lieu of Channel 241C2 at Somerset, thus resolving the short spacing conflict.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-201

In the Matter of

Amendment of Section 73.202(b), RM-7185
Table of Allotments,
FM Broadcast Stations.
(Fayetteville, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 27, 1991; Released: April 8, 1991

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 2539 (1990), proposing the substitution of Channel 221C3 for Channel 221A at Fayetteville, Arkansas, and modification of the license of Demaree Media, Inc. (petitioner), for Station KKEG(FM), Channel 221A, accordingly. Petitioner filed supporting comments. Communications Corporation ("Communications"), licensee of Station KEZA(FM), Channel 300C, Fayetteville, Arkansas, also filed comments to which the petitioner responded.

2. Channel 221C3 at Fayetteville lies within the Grade B contour of Station KOTV(TV), Channel 6, Tulsa, Oklahoma. Therefore, petitioner was requested to furnish a preclusion study demonstrating the impact of a Channel 221C3 allotment at Fayetteville on the future availability of Class A, C3, C2, C1 and C noncommercial allotments on Channel 218, 219 and 220 within the affected area.

3. Petitioner submitted a preclusion study for the proposed operation of Station KKEG(FM) on Channel 221C3 at Fayetteville. According to petitioner, the only new preclusion would occur on Channels 220A, 220C3 and 220C2. However, petitioner states that the communities located in the precluded areas either already have noncommercial educational stations or have other noncommercial channels available for their use. Therefore, petitioner claims the availability of potential noncommercial educational service in the Fayetteville region will not be significantly affected by this proposal.

4. In response to the *Notice*, Communications advises that petitioner also has common ownership with Station KOLZ(FM), Channel 252A, Bentonville, Arkansas,[1] and Station KFAY-FM, Channel 225A, Huntsville, Arkansas, both of which are located north of Fayetteville in the direction of the site specified for Channel 221C3. Communications questions whether the Fayetteville proposal would violate Section 73.3555 of the Commission's Rules which prohibits overlap of the 3.16 mV/m contours of commonly owned FM broadcast stations.

5. With respect to the contour overlap concerns expressed by Communications, petitioner responded that in the event it still maintains an ownership interest in either Station KOLZ(FM), Bentonville or Station KFAY-FM, Huntsville, when an application is tendered for implementing the Fayetteville modification, it will then take appropriate steps to resolve the prohibited overlap.

6. Based on a review of the petitioner's preclusion study, we find that there will be no significant impact on noncommercial educational service development in the region if Channel 221C3 is allotted to Fayetteville. Therefore, we believe the public interest will be served by substituting Channel 221C3 for Channel 221A at Fayetteville since it could enable Station KKEG(FM) to provide expanded service to the community. As indicated in the *Notice*, Channel 221C3 can be allotted to Fayetteville at the petitioner's specified site located 20.5 kilometers (12.7 miles) northeast of the community,[2] consistent with the minimum distance separation requirements of the Commission's Rules. Petitioner will be expected to submit an application to specify facilities for Station KKEG(FM), Fayetteville, that will avoid prohibited overlap of the 3.16 mV/m contours of its commonly owned stations at Bentonville and Huntsville. [3] In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Demaree Media, Inc., for Station KKEG(FM) to specify operation on Channel 221C2 in lieu of Channel 221A at Fayetteville, Arkansas.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 23, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Fayetteville, Arkansas	221C3, 280C1, 300C

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Demaree Media, Inc., for Station KKEG(FM), Fayetteville, Arkansas, IS MODIFIED to specify operation on Channel 221C3 in lieu of Channel 221A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Demaree has also filed a separate proposal to modify the facilities of Station KOLZ(FM) to specify operation on Channel 252C3 at Bentonville in RM-7586.

[2] Coordinates used for Channel 221C3 at Fayetteville are 36-11-00 and 93-59-00.

[3] *See* 47 C.F.R. § 73.3555(a)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-238

In re Applications of

RONALD SORENSON	File No. BPH-870430MM
MIDWEST RADIO, INC.	File No. BPH-870430MQ
SANTEE BROADCASTING, INC.	File No. BPH-870430MV
Beverly J. Hewitt, Ruth Sirko, *et al.* d/b/a HIGH TOWER PARTNERSHIP	File No. BPH-870430ND

For construction permit for a New FM Station, Channel 298C2 (107.5 MHz) at Des Moines, Iowa

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1991; Released: April 9, 1991

By the Commission:

1. This Memorandum Opinion and Order overturns a Review Board Decision, *Ronald Sorenson*, 5 FCC Rcd 3144 (Rev. Bd. 1990), which granted Ronald Sorenson's application for a new FM Station at Des Moines, Iowa, and instead grants the application filed by Midwest Radio, Inc. Now under consideration are Applications for Review filed June 21, 1990 by Santee Broadcasting, Inc. and by High Tower Partnership, and June 22, 1990 by Midwest; a Contingent Application for Review filed June 22, 1990 by Sorenson; and Oppositions filed July 6, 1990 by Midwest and by Sorenson. The Application for Review filed by Midwest is granted, and the Applications for Review filed by Santee and High Tower, and the Contingent Application for Review filed by Sorenson, are denied.

I. BACKGROUND

2. The Review Board properly found that Sorenson and Midwest are the only applicants entitled to credit for 100 per cent integration, enhanced by local residence and civic activities.[1] 5 FCC Rcd at 3147 ¶ 17. Sorenson has lived in Des Moines all of his life (he was born in 1948). Midwest's principal, Richard Eychaner, lived in Des Moines from 1975 to 1986, and since 1986 he has lived in the adjacent community of West Des Moines.[2] Citing *Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984) the Board granted Sorenson an enhancement advantage for local residence. 5 FCC Rcd at 3145 ¶ 8. It awarded Midwest an enhancement advantage for civic activities. 5 FCC Rcd at 3145-56 ¶¶ 9-10, 3147 ¶ 17. Citing *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1109 (Rev. Bd. 1984) *rev. denied*, 100 FCC 2d 941 (1985), the Board said that local residence and civic activities are separate enhancement factors and that local residence is more significant than civic activities. The Board concluded that Sorenson's advantages for local residence and broadcast experience outweigh Midwest's advantage for civic activities and it awarded Sorenson a preference for integration. The Board then concluded that Sorenson's integration preference outweighed a preference awarded Midwest for superior coverage [3] and it granted Sorenson's application. 5 FCC Rcd at 3147 ¶ 17.

3. This is a very close comparative proceeding. The issue before us is whether an applicant who has lived all of his life in a community, with minimal civic activities and with a slight advantage for broadcast experience, should be preferred over an applicant whose principal has lived in the community for about 15 years and has an extensive and impressive record of civic involvement and is entitled to a slight preference for superior signal coverage. We find that the Board erred in its evaluation of the qualitative integration enhancement factors, and that Midwest's application is preferred under the standard comparative criteria.

II. MIDWEST'S INTEGRATION

4. Before comparing Midwest's and Sorenson's integration proposals, we must first address arguments concerning Eychaner's ability to fulfill his integration commitment. Sorenson, High Tower and Santee all argue that Eychaner has substantial business activities in the Des Moines area and that he has not shown how he will curtail those activities in order to fulfill his integration commitment. These arguments are without merit. Eychaner works between 40-50 hours a week at a chain of video stores that he owns. He will turn over the management of the stores to Andrew Burton, a long time and trusted employee, who was vice president of the company that operates the stores.[4] Tr. 321-22; Midwest Exh. 2. Burton will give up some of his current duties, another employee will assist Burton, and if needed, additional employees will be hired. Tr. 407-08. Eychaner testified that he spends negligible amounts of time on his other enterprises and that they will not interfere with his integration proposal. Tr. 331-12, 319-20. Thus, Eychaner's unrebutted testimony fully established that he will be able to fulfill his integration commitment.

III. THE INTEGRATION CRITERION

5. The Board erred in treating local residence and civic activities as separate enhancement factors and in finding that Sorenson was entitled to an integration preference. In the past, we have considered civic activities as part of an applicant's local residence without having to address how disparities in those factors are to be weighed against each other. *See Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1262-1263 (1982). In the *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 396 (1965), we recognized local residence as an enhancement factor be-

cause it "indicates a likelihood of continuing knowledge of changing local interests and needs." We also held, however, that civic activities "will be considered as part of . . . local residence . . . as . . . indicating a knowledge of and interest in the welfare of the Community." *Id.* The Board placed undue reliance on *Radio Jonesboro* to treat local residence and civic activities as separate enhancement factors. In our view, *Radio Jonesboro* simply holds that local residence is not invariably a prerequisite for consideration of civic activities. 100 FCC 2d at 947. Although that decision did treat civic activities as a separate enhancement factor,[5] it provided no rationale or other justification for a general departure from the *1965 Policy Statement* or from the then recent treatment of residence and civic activities as elements of a single local residence factor in *Waters*, 91 FCC 2d at 1262-1263. *See also Metro Broadcasting, Inc.*, 2 FCC Rcd 1474, 1475 ¶ 10 (1987), characterizing one applicant's local residence and civic activities as a single qualitative factor. Accordingly, civic activities are an aspect of an applicant's familiarity with the community of license and should be considered with local residence as a comparative factor to determine which applicant has the greater likelihood of knowledge of and interest in the community.

6. *Local Residence*: Both Sorenson and Eychaner have long term local residence sufficient to indicate "a likelihood of knowledge of changing local interests and needs." If this were the sum total of the record, Sorenson would have an advantage because of his longer term residence. *See Vacationland Broadcasting Co., Inc.*, 97 FCC 2d 485, 496 (Rev. Bd. 1984). But we also have evidence of how Sorenson and Eychaner have been involved in the community, and it is here that Midwest has established its overall superiority on this factor.

7. *Midwest*: Eychaner has been and still is involved in an impressive number of civic activities. Eychaner's activities are fully set forth in the Initial Decision and need not be repeated here. 4 FCC Rcd at 6965 ¶¶ 55-58. The record establishes that Eychaner, in addition to being an active member, was also a founder of or involved in the leadership of an extremely wide range of groups involved in counseling, outreach to the poor, community development, business development, lobbying on social issues, and local and national politics.

8. *Sorenson*: The Board erred in awarding Sorenson enhancement credit for producing and airing public service announcements (PSAs) on KBLE, a radio service available to cable television subscribers. The Board found that Sorenson "has been aiding all sorts of Des Moines' civic groups by producing, scheduling and programming their public service announcements." 5 FCC Rcd at 3146 ¶ 10. It concluded that Sorenson's involvement with PSAs on KBLE can be "expected to familiarize him with the needs and problems of the community and expose him to the programs and objectives of many of the Des Moines service organizations." *Id.*

9. While Sorenson testified that he was involved in the production of PSAs (Sorenson Exh. 1, p. 3), he subsequently admitted that he produced very few PSAs and normally runs PSAs which he receives from various organizations. He listens to them to determine if they are appropriate for airing and dubs them into the automated broadcast system. Tr. 279-280. There is no record evidence that the PSAs were for local Des Moines service organizations or indicating how they familiarized him with the needs and interests of the community. Thus, the PSAs should not add any weight to Sorenson's record of civic activities.[6]

10. Sorenson's activities included his involvement in the 1972 presidential campaign and his work as a volunteer counselor with the Community Telephone Service in 1974-75. These activities have been discontinued and are remote in time. Thus, they have minimal impact on Sorenson's qualifications. *See Linda Crook*, 3 FCC Rcd 354 at ¶ 5 (Rev. Bd. 1988) holding that an activity occurring 20 years ago "is so remote in time . . . to be meaningless in terms of an appreciation of the current problems, needs and interest of the community." Sorenson is also a member of the Drake Neighborhood Association and was active in their street fairs in 1979 and 1980, and participated in benefit concerts in 1985 and 1986 for the benefit of the Food Bank of Iowa and the Iowa Farm Unity Coalition.

11. We agree with Midwest that it has a substantial advantage over Sorenson for civic activities. Eychaner has had greater and continuing involvement, whereas Sorenson has been involved in fewer activities and he has not shown a continuing significant involvement. While both applicants have long term residence sufficient to develop a continuing knowledge of local interests and needs, any advantage which accrues to Sorenson for his longer local residence is outweighed by Midwest's substantial advantage for civic activities indicating greater overall knowledge of and interest in the community. *See 1965 Policy Statement*, 1 FCC 2d at 396. Thus, in making the overall comparison of the two applicants, we find that Midwest is entitled to a significant enhancement credit on the local residence factor.

12. *Broadcast Experience*: We also find that the Board erred in its consideration of the broadcast experience enhancement factor.[7] The Board properly credited Sorenson's experience as an announcer on KFMG-FM, Des Moines, from 1967-69 and as program director from 1969-71.[8] Sorenson also claimed credit for his ownership and management of KBLE. Midwest, citing *James and Sharon Deon Sepulveda*, 3 FCC Rcd 9 (Rev. Bd. 1988), claimed credit for broadcast experience because Eychaner has been producing a weekly public affairs program for the Iowa Cable Network and was the color commentator for the local minor league baseball club on cable television. However, the Board refused to credit the cable experience of either applicant, citing *Tele - Media Corp. v. FCC*, 697 F. 2d 402, 412 (D.C. Cir. 1983), where the Court held that broadcasters and cable operators have different responsibilities. The Board also rejected Midwest's reliance on *Sepulveda*, because that proceeding did not involve cable experience. 5 FCC Rcd at 3146.

13. In the *1965 Policy Statement*, we recognized that previous experience "has some value when put to use through integration of ownership and management." 1 FCC 2d at 396. In *Sepulveda*, the Board recognized that non-managerial experience, such as producing and hosting broadcast programs, is entitled to credit under broadcast experience. The *Tele - Media* proceeding was improperly relied on by the Board because it did not consider the question of whether such activities may effectively provide broadcast experience despite the different responsibilities of broadcasters and cable operators. We find, that to the extent a cable operator actually presents programming responsive to local needs, such activities are analogous to broadcast experience. Moreover, in this pro-

ceeding, we do not see a significant difference between, on the one hand, Eychaner's experience as a commentator on cablecasts of minor league baseball games and his production and hosting of interview programs on the Iowa Cable Network[9] and, on the other hand, Sorenson's experience with KBLE, and Sorenson's experience as an announcer and program director at KFMG-FM. Thus, Midwest and Sorenson are both entitled to credit for their cable experience.

14. Sorenson's broadcast experience was limited to four years at KFMG-FM with only two years in a managment position, and to his current operation of KBLE. That total experience is offset in part by Eychaner's cable experience. In the *Policy Statement* we held that because broadcast "experience generally confers only an initial advantage it will be deemed of minor significance." 1 FCC 2d at 396. Based on our review of the full record, we conclude that Sorenson is entitled to only a very slight advantage over Midwest for his broadcast experience. *Northern Sun Corporation*, 100 FCC 2d 889, 892 (Rev. Bd. 1985), *rev. denied*, FCC 86-135, released March 26, 1986.

IV. THE COMPARATIVE SUMMATION

15. Midwest is entitled to a preference for integration because its substantial advantage for the factor of local residence outweighs Sorenson's very slight advantage for the less important broadcast experience factor. The preference awarded for integration, together with the slight preference awarded Midwest for its superior coverage, fully supports a grant of Midwest's application.[10]

16. ACCORDINGLY, IT IS ORDERED, That the Application for Review filed June 22, 1990 by Midwest Radio, Inc. IS GRANTED and that the Applications for Review filed June 21, 1990 by Santee Broadcasting, Inc. and by High Tower Partnership, and the Contingent Application for Review filed June 22, 1990 by Ronald Sorenson ARE DENIED.

17. IT IS FURTHER ORDERED, That the Decision of the Review Board, *Ronald Sorenson*, 5 FCC Rcd 3144 (Review Board 1990), IS MODIFIED as reflected herein; and that the application filed by Midwest Radio, Inc. (File No. BPH-870430MQ) IS GRANTED; and that the applications filed by Ronald Sorenson (File No. BPH-870430MM), Santee Broadcasting, Inc. (File No. BPH-870430MV), and High Tower Partnership (File No. BPH-870430ND) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] High Tower argues that the Board erred in awarding Midwest integration credit because Midwest's corporate structure leaves the applicant subject to improper manipulation by non-voting stockholders. Specifically, High Tower asserts that Midwest's principal, Richard Eychaner, owns both voting and non-voting stock, and Midwest's non-voting stockholders cannot be materially involved in the management of Midwest. This argument was properly rejected by the ALJ applying the Commission's decision in *Cotton Broadcasting Company*, 4 FCC Rcd 1781 (1989). *Ronald Sorenson*, 4 FCC Rcd 6961, 6965 ¶ 60 (ALJ 1989). We find no material distinction between Midwest's two-tiered corporate structure and the limited partnership structure considered in *Cotton*. High Tower's further argument concerning a possible stockholder's derivative suit against Eychaner by other non-voting shareholders is based on speculation, with no foundation in the record.

[2] As noted by the Board, Eychaner's residence in the adjacent community of West Des Moines is equal in importance to residence within the proposed community of license. 5 FCC Rcd at 3149 n. 10 and cases cited therein. *See* also *New Continental Broadcasting Company*, 88 FCC 2d 830, 849 n. 20 (Rev. Bd. 1981), *recon. denied*, 89 FCC 2d 63 *1* (Rev. Bd. 1982), *remanded on other grounds*, 93 FCC 2d 1275 (1983).

[3] Midwest will serve approximately 7 per cent more people than Sorenson. However, all of the areas to be served receive service from 5 or more aural services.

[4] Midwest, in its Opposition to Applications for Review, advised the Commission that Burton is now president of the company.

[5] *Radio Jonesboro* involved an unusual factual situation in which the Commission awarded enhancement credit for a principal's involvement on the Board of Trustees of the State University located in the community to be served, even though he was not a local resident. 100 FCC 2d at 947 ¶ 10. Nothing about that case altered the fundamental holding of *Waters* that local residence and minority ownership are entitled to equal weight. *Radio Jonesboro*, 100 FCC 2d at 945 ¶ 7. By the same token, the statement in *FM Broadcast Assignments*, 101 FCC 2d 638, 645 n.12 (1985), that past participation in civic affairs is accorded less weight, with a citation to *Radio Jonesboro*, merely indicates that, in a situation where an applicant has a relevant record of civic activities without local residence, the applicant would be entitled to less credit than would ordinarily be the case. *See also Radio Jonesboro*, 100 FCC 2d at 948 ¶ 11.

[6] In this regard, there is no showing that these PSAs differed from PSAs broadcast on other media and there is no precedent or basis for crediting broadcasters and their employees with civic activities for merely airing PSAs. Moreover, if such a showing were to be considered as a basis for credit for civic activities, the Board further erred by failing to consider Eychaner's involvement in producing public interest programming on the Iowa Cable Network, and it did not consider whether that programming would provide Eychaner with the same kind of knowledge of community needs that the Board attributed to Sorenson for carrying PSAs.

[7] The ALJ awarded Sorenson a substantial preference for broadcast experience. 4 FCC Rcd at 6969 Conc. 20. The Board concurred that Sorenson was entitled to an advantage, but modified the ALJ's findings. 5 FCC Rcd at 3146 ¶ 12.

[8] Although Sorenson worked as Midwest Regional Radio Network Coordinator for the McGovern Presidential Campaign in 1972, the Board correctly refused to credit his involvement with the McGovern campaign because it was stricken from the record without objection. 5 FCC Rcd at 3146 ¶¶ 11-12; Tr. 63-64.

[9] Midwest represented that if it is granted a license it will move the "Iowa Inquiry" program from cable to its new FM station. Midwest Ex. 2, p. 6; Tr. 381.

[10] Midwest claims further enhancement credit for Eychaner's sexual orientation. There is no precedent for awarding a preference predicated on sexual orientation. The Commission has refused to extend the enhancement credit awarded to women and minorities to other groups, and we are not inclined to

exercise our discretion to do so here. *Broadcast Associates of Colorado*, 104 FCC 2d 16, 20 (1986) (credit based on physical handicap denied); *Julia S. Zozaya*, 5 FCC Rcd 6607, 6608 ¶ 7 (credit based on low income status denied). In any event, based on our finding that Midwest's application is preferred under the standard comparative criteria, Midwest's claim for additional credit for its principal's sexual orientation was not given any consideration in this case.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-61

In re Applications

REPUBLIC BROADCASTING COMPANY — File No. BPCT-900220KE

PENA COMMUNICATIONS, INC. — File No. BPCT-900424KF

For Construction Permit for a new Television Station on channel 10 in Del Rio, Texas

HEARING DESIGNATION ORDER

Adopted: March 7, 1991; Released: April 9, 1991

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 10, Del Rio, Texas.

2. The effective radiated visual power, antenna height above average terrain and other technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population that each proposes to serve. Consequently, the areas and population which would be within the predicted 56dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

3. Section 73.685(e) of the Commission's Rules states that stations operating on Channels 2-13 will not be permitted to employ a directional antenna having a ratio of maximum to minimum radiation in the horizontal plane in excess of 10dB. Republic[1] proposes to employ a directional antenna that will exceed the allowable maximum to minimum radiation ratio. Republic has not requested a waiver of Section 73.685(e). Accordingly, an appropriate issue will be specified.

4. Section 73.685(f) of the Commission's Rules requires an applicant proposing to use a directional antenna to include a tabulation of relative field pattern, oriented so that 0^0 corresponds to True North and tabulated at least every 10^0 plus any minima or maxima. Republic has not supplied this data. Accordingly, Republic will be required to submit an amendment with the appropriate information to the presiding Administrative Law Judge and copies to the Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after this Order is released.

5. Pena[2] provides a qualified certification with respect to the availability of its proposed transmitter site, having contacted a Mr. Sterling C. Evans. However, Pena indicates that Mr. Evans may not be the site owner. Under the circumstances, an issue will be specified.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether Pena Communications, Inc., has reasonable assurance that its proposed transmitter site will be available.

2. To determine with respect to Republic Broadcasting Company whether circumstances exist which would warrant a waiver of Section 73.685(e) of the Commission's Rules.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That Republic Broadcasting Company shall submit an amendment providing the information required by Section 73.685(f) of the Commission's Rules, to the presiding Administrative Law Judge and copies to Chief, Television Branch and the Chief, Hearing Branch, Mass Media Bureau, within 30 days after the release of this Order.

9. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Republic Broadcasting Company, on August 20, 1990 IS GRANTED and the amendment filed on the same date IS ACCEPTED for filing for Section 1.65 purposes only.

10. IT IS FURTHER ORDERED, That the petition for leave to amend filed by Pena Communications, Inc., on June 19, 1990, IS GRANTED and the amendments filed on the same date and on October 9 and 31, 1990, ARE ACCEPTED for filing for Section 1.65 purposes only.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant, to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intent to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each ap-

plicant shall attach to its notice of appearance a remittance of $6,760 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman, Chief
Video Services Division
Mass Media Bureau

FOOTNOTES

[1] Republic Broadcasting Company filed a Petition for Leave to Amend and Amendment on August 20, 1990 after the "B" cut-off date. Since the amendment was required by Section 1.65 of the Rules in order to maintain the accuracy and completeness of the application, the petition and amendment will be accepted for Section 1.65 purposes only.

[2] Pena Communications, Inc. filed a Petition for Leave to Amend on June 19, 1990 and amendments on October 9 and 31, 1990, both after the "B" cut-off date. Since the amendments were required by Section 1.65 of the Rules in order to maintain the accuracy and completeness of the application, the petition and amendments will be accepted for Section 1.65 purposes only.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTINENTAL INTERCELL, INC. File No. I-T-C-91-046

Application for authority to resell the services of other common carriers to provide switched voice service to specific international points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1991; Released: April 9, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed by Continental Intercell, Inc. (CII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched voice services set forth in AT&T's Tariffs FCC Nos. 1, 12 and 16, MCI's Tariff FCC No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 for the provision of international switched voice service between the U.S. and various international points. The application was placed on public notice on January 16, 1991. No comments were received.

2. CII is a newly formed company, organized to provide international switched voice service. CII is a Delaware corporation wholly-owned by McCaw Cellular Communications, Inc. (MCCI). British Telecom USA, a wholly-owned subsidiary of British Telecom, owns approximately 22% of MCCI's out-standing shares.[1] As a result, CII is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier* policies, 102 F.C.C. 2d 812, 842 (1985), *recon. denied*, 60 Rad. Reg. 2d (P&F) 1435 (1986), and is dominant in its provision of international common carrier services between U.S. and international points.

3. As a dominant carrier in its provision of international common carrier services, CII remains subject to traditional entry and rate regulation. Our Section 214 authorizations issued to dominant carriers specify the facilities they may acquire or lease to provide a particular service to the authorized international points. In the case of resale carriers, these orders authorize carriers to provide an identified resale service, such as international switched voice, by reselling the services set forth in a particular underlying carrier tariff to specified international points. Dominant carriers seeking to supplement or modify their existing authorization must do so by formal application. Such applications are required where the dominant carrier seeks to provide a new service, resell an additional offering not specified in its existing Section 214 authorizations, or serve additional points set forth in the underlying carriers' tariffs but not specified in the reseller's existing Section 214 authorizations.

4. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future convenience and necessity require the provision of resale of international switched voice service by CII between the United States and the points listed in Appendix A to this decision.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-91-046 IS GRANTED, and CII is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 1, 12 and 16, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs FCC Nos. 1 and 2 between the U.S. and the points listed in the Appendix A.

6. IT IS FURTHER ORDERED that CII shall file copies of any operating agreements entered into by itself or its parent/affiliate with its correspondents within 30 days of their execution.

7. IT IS FURTHER ORDERED that CII shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries CII is authorized to serve within 90 days from the end of each calendar quarter.

8. IT IS FURTHER ORDERED that the applicant shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

9. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

10. IT IS FURTHER ORDERED that CII shall file annual traffic and revenue reports as provided in Section 43.81 of the Commission's Rules, 47 C.F.R. Section 43.81 concerning traffic originating or terminating within the United States.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *See* McCaw Cellular Communications, Inc., 4 FCC Rcd 3784 (1989).

APPENDIX A

Afghanistan
Algeria
American Samoa
Andorra
Angola
Anguilla
Antarctica (Casey Base)
Antarctica (Scott Base)
Antigua (Barbuda)
Argentina
Aruba
Ascension Island
Australia
Austria

Bahamas
Bahrain
Bangladesh,
Peoples Republic of
Barbados
Belgium
Belize
Benin, People's Republic of
Bermuda
Bhutan
Bolivia
Botswana
Brazil
British Virgin Islands
(Anegada, Camanoe
Island, Guana Island,
Jost Von Dyke, Little
Thatch, Marina Cay,
Mosquito Island, Peter
Island, Salt Island,
North Sound, Tortola and
Virgin Gorda)
Brunei
Bulgaria
Burkina Faso
Burma
Burundi

Cameroon, United Republic of
Canada
Cape Verde Islands
Cayman Islands
Central African Republic
Chad Republic
Chile
China, People's Republic of
Christmas and Cocos Islands
(Indian Ocean)
Colombia
Comoros, Federal and
Islamic Republic of
Congo, Republic of
Cook Islands
Costa Rica
Cuba
Cyprus
Czechoslovakia

Denmark
Djibouti, Republic of
Dominica
Dominican Republic

Easter Island
Ecuador
Egypt, Arab Republic of
El Salvador
Equatorial Guinea,
Republic of
Ethiopia

Faeroe Islands
Falkland Islands
Federated States of
Micronesia
Fiji Islands
Finland
France
French Antilles (Martinique,
St. Barthelemy, and St.
Martin)
French Guiana
French Polynesia (including
the Islands of Moorea
and Tahiti)

Gabon Republic
Gambia
German Democratic Republic
Germany, Federal Republic of
Ghana
Gibraltar
Greece
Greenland
Grenada (including Carriacou)
Guam
Guadeloupe
Guantanamo (U.S. Naval Base)
Guatemala
Guinea, People's
Revolutionary Republic
Guinea-Bissau

Haiti
Honduras
Hong Kong
Hungary

Iceland
India
Indonesia
Iran
Iraq
Ireland
Israel
Italy
Ivory Coast, Republic of

Jamaica
Japan (including Okinawa)
Jordon

Kenya
Kiribati
Korea, Republic of
Kuwait

Laos
Lebanon
Lesotho
Liberia
Libyan Arab People's
Socialist Jamahiriya
Liechtenstein
Luxemburg

Macao
Madagascar,
Democratic Republic of
Malawi
Malaysia
Maldives, Republic of
Mali Republic
Malta, Republic of
Marshall Islands
Mauritania, Islamic
Republic of
Mauritius
Mexico
Midway
Monaco
Mongolian People's Republic
Montserrat
Morocco, Kingdom of
Mozambique

Namibia
Nauru
Nepal
Netherlands
Netherlands Antilles
(Bonaire, Curacao,
Saba, St. Eustatius and
St. Maartan)
Nevis
New Caledonia
New Zealand (including
Chatham Island)
Nicaragua
Nigeria, Federal Republic of
Niger Republic
Niue
Norfolk Island
Norway (including Svalbard)

Oman

Pakistan
Palau, Republic of
Panama, Republic of
Papua New Guinea (Admiralty
Islands, Bougainville,
New Britain and New
Ireland)
Paraguay
Peru
Phillipines
Pitcairn Island

Poland, People's Republic of
Portugal (including Azores and Madeira Islands)

Qatar

Reunion Island
Romania, Socialist Republic of
Rwanda

St. Helena
St. Kitts
St. Lucia
St. Pierre and Miquelon
St. Vincent and The Grenadines
Saipan (including Rota and Tiaian)
San Marino
Sao Tome
Saudi Arabia
Senegal Republic
Seychelles Islands
Sierra Leone
Singapore, Republic of
Solomon Islands
Somali Republic
South Africa, Republic of
Spain (including Balearic Islands, Canary Islands, Couta and Melilla)
Spanish Sahara
Sri Lanka, Democratic Socialist Republic of
Sudan
Suriname, Republic of
Swaziland
Sweden
Switzerland
Syrian Arab Republic

Taiwan
Tanzania
Thailand
Togo, Republic of
Tonga Islands
Trinidad and Tobago, the Democratic Republic of
Tunisia
Turkey
Turks and Caicos Islands
Tuvalu

Uganda
Union of Soviet Socialist Republics
United Arab Emirates (Abu Dhabi, Ajman, Dubai Fujairah, Ras al Khaimah, Sharjah, and Umn al Qaiwain)
United Kingdom (including the Channel Islands, England, Isle of Man, Northern Ireland, Scotland and Wales)
Uruguay

Vanuatu, Republic of
Vatican City
Venezuela

Wake
Wallis and Futuna Islands
Western Samoa

Yemen Arab Republic
Yemen, People's Democratic Republic
Yugoslavia

Zaire, Republic of
Zambia
Zimbabwe

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-91-055

Application for authority to convey and reassign facilities in the TAT-8 Cable.

ORDER AND AUTHORIZATION

Adopted: March 29, 1991; Released: April 9, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on January 28, 1991 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to convey and reassign a total of 135 Minimum Assignable Units of Ownership (MAUOs) in the TAT-8 Cable. The application was placed on public notice on February 6, 1991. No comments were received. Upon consideration of the application, we find that grant thereof is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-055 IS GRANTED, and AT&T is authorized to:

a. convey, on an Indefeasible Right of User (IRU) basis, its half-interests in 90 MAUOs in the TAT-8 Cable to Kokusai Denshin Denwa Co., Ltd. (KDD), Hong Kong Telecom International (HKTI) and French Cable and Radio (FC&R) as listed in Appendix A; and

b. reassign 45 MAUOs in the TAT-8 Cable to communicate with its correspondents Italcable in Italy and TPTT in Turkey as listed in Appendix B.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX A

AT & T DISPOSAL OF HALF - INTERESTS IN TAT - 8

Source	For Use With	Half-Interests In MAUOs	Cable Segments
AT&T/ AUSTRIA	HKTI/ AUSTRIA	2	Tuckerton, New Jersey - Penmarch, France
AT&T/ FRANCE	FC&R/ FRANCE	30	Tuckerton, New Jersey - Penmarch, France
AT&T/ GERMANY	HKTI/ GERMANY	20	Tuckerton, New Jersey - Widemouth, England
AT&T/ IRELAND	KDD/ SPAIN	30	Tuckerton, New Jersey - Penmarch, France
AT&T/ SWITZER-LAND	HKTI/ SWITZER-LAND	8	Tukerton, New Jersey - Penmarch, France
	TOTAL	90	

APPENDIX B

REASSIGNMENT OF HALF-INTERESTS IN TAT-8

Source	For Use With	Half-Interests In MAUOs	Cable Segments
AT&T/ GREECE	AT&T/ ITALCABLE	19	Tuckerton, New Jersey - Penmarch, France
AT&T/ NETHER-LANDS	AT&T/ ITALCABLE	11	Tuckerton, New Jersey - Penmarch, France
AT&T/ PORTUGAL	AT&T/ TPTT	15	Tuckerton, New Jersey - Penmarch, France
	TOTAL	45	

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE CO., INC. — File No. I-T-C-90-158

Application for authority to acquire and operate facilities for service between the U.S. Virgin Islands and Puerto Rico, on the one hand, and Haiti and Trinidad, on the other hand and beyond.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1991; Released: April 9, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 9, 1990 and supplemented on December 18, 1990 by St. Thomas & San Juan Telephone Co., Inc. (STSJ), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate additional facilities for service between the U.S. Virgin Islands and Puerto Rico, on the one hand, and Haiti and Trinidad, on the other hand, and beyond. The application was placed on public notice on August 15, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity. Further, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. Virgin Islands and Puerto Rico, on the one hand, and Haiti and Trinidad, on the other hand, by STSJ.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-158 IS GRANTED, and STSJ is authorized to:

a. acquire, by an Indefeasible Right of User (IRU) or lease, from AT&T a one-half interest in 20 voice-grade circuits between Haiti and San Juan, Puerto Rico connecting with STSJ's St. Thomas operating office;[1]

b. use the facilities in a above to provide STSJ's regularly authorized services between the Virgin Islands and Puerto Rico, on the one hand, and Haiti, on the other hand, and beyond;

c. acquire, by IRU or lease, a one-half interest in 24 voice-grade circuits between STSJ's St. Thomas operating office and Tortola via AT&T's microwave facilities;

d. acquire, by IRU or lease, a one half interest in 24 voice-grade circuits between Tortola and Trinidad via Cable and Wireless microwave facilities; and

e. use the facilities in c and d above to provide STSJ's regularly authorized services between the U.S. Virgin Islands and Trinidad and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between STSJ and its correspondent in Haiti and Trinidad, and copies of the agreements shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

5. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] STSJ states that it will acquire circuits from AT&T in Segment G of the TCS-1 fiber optic cable between Santo Domingo, Dominican Republic, and San Juan, Puerto Rico, which will be connected to STSJ's point of presense in St. Thomas via microwave facilities owned by STSJ. The circuits will be connected between Santo Domingo and Port au Prince, Haiti via microwave facilities owned by CodeTel.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INTERNATIONAL TELECOM, INC. File No. I-T-C-91-062

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1991; Released: April 9, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on February 13, 1991 by International Telecom, Inc. (ITI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice services between the U.S. and various overseas points. The application was placed on public notice on February 20, 1991. No comments were received.

2. The applicant is a non-dominant start-up company which proposes to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by ITI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-91-062 IS GRANTED, and ITI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1, US Sprint's Tariff F.C.C. No. 1 and Alascom's Tariff F.C.C. No. 10 between the United States and the points listed in those tariffs.

5. Copies of any operating agreements entered into between the applicant and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in *Teltec Saving Communications Co.*, File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Mackay Radio and Telegraph Co.*, 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION File No. I-T-C-91-063

Application for authority to acquire and operate facilities for direct service between the U.S. and South Africa.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1991; Released: April 9, 1991

By the Chief, International Facilities Division:

1. The above-captioned application filed on February 13, 1991 by MCI Telecommunications Corp. (MCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct service between the U.S. and South Africa. The application was placed on public notice on February 20, 1991. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and South Africa by MCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-91-063 IS GRANTED, and MCI is authorized to:

a. lease from Comsat and operate 90 voice-grade satellite circuits between the Andover, Maine earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in South Africa furnished by MCI's correspondent in South Africa;

b. own and operate 90 voice-grade circuits in the Andover, Maine earth station;

c. own and operate 90 voice-grade connecting circuits between the Andover earth station and MCI's operating center in West Orange, New Jersey; and

d. use said facilities to provide MCI's regularly authorized services, including switched voice service, between the U.S. and South Africa and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MCI and its correspondent in South Africa. A copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-62

In the Matter of

Amendment of Part 90.69 of the Commission's Rules and Regulations Concerning Eligibility in the Motion Picture Radio Service — RM-7406

NOTICE OF PROPOSED RULE MAKING

Adopted: March 12, 1991; Released: April 10, 1991

By the Commission:

I. INTRODUCTION

1. By this *Notice of Proposed Rule Making* (*Notice*), we initiate a proceeding to expand our eligibility criteria for the Motion Picture Radio Service (MPRS). On March 16, 1990, the Alliance of Motion Picture and Television Producers (AMPTP) filed a Petition for Rule Making (Petition)[1] requesting that the Commission amend Section 90.69 of the Rules governing eligibility in and use of the Motion Picture Radio Service (MPRS).[2] In its petition, AMPTP requests expansion of the eligibility provisions of Section 90.69(a) to include "persons engaged in the production, video taping or filming of television programs of major events (*e.g.*, sporting events, political conventions) for purposes of releasing the processed final product to television outlets for broadcasting or to film entities for theatrical distribution.[3] Subsequently, in informal comments, the Special Industrial Radio Service Association, Inc. (SIRSA) supported expansion of the AMPTP petition to include eligibility for entities engaged in "producing educational or training films which would not be shown at theaters or on television . . . [since] the production of training and educational films would appear to satisfy a legitimate public need and be consistent with the essential purposes underlying this radio service.[4]

II. BACKGROUND

2. Operations in the private land mobile services are governed by Part 90 of the Commission's Rules. Part 90, in turn, is comprised of five broad service categories: Public Safety, Special Emergency, Industrial, Land Transportation, and Radiolocation Radio Services. Each service category represents a grouping based on the land mobile user's primary activity. Eligibility in a particular radio service is founded on the premise that similarly situated users with similar communications needs are more likely to be compatible in terms of their operational requirements. The Industrial Radio Service, for example, consists of the Power, Petroleum, Forest Products, Motion Picture, Relay Press, Special Industrial, Business, Manufacturers, and Telephone Maintenance Services.

3. The use of radio frequencies to assist motion picture production initially was authorized under the Radio Act of 1927. In 1937, the Commission set forth the rationale for establishment of the Motion Picture Radio Service:

> Motion-picture stations [footnote omitted] were provided for by the Federal Radio Commission, after hearing, for use in the motion-picture industry in connection with the production of major motion-pictures. These stations are not to be used to replace wire lines, but may be authorized for operation when pictures are to be taken at sea, in the desert, or under circumstances where the operation of large groups of personnel must be coordinated or aircraft directed. Considerable use has been made of these facilities, and the success of many motion-pictures may be attributed in part to the existence of this class of station.

Third Annual Report of the Federal Communications Commission to the Congress of the United States for the Fiscal Year 1937, at 72-73.

4. Since 1937, no action has been taken to expand eligibility in this service. We note, as a historical matter, that at the time the Motion Picture Radio Service was conceived, the only type of films produced was motion pictures intended for theatrical distribution. Now, however, there are diverse, alternative producers of mass media programming, of which motion pictures intended for theatrical screenings are only a part.

III. DISCUSSION

5. In support of its request to expand the eligibility for the Motion Picture Radio Service to include television users, AMPTP argues that the intent of the Commission in 1937 was to provide two-way land mobile radio communications for the filming of movies at remote locations for large and complex scenes.[5] It adds that the Commission recognized the importance of radio facilities to the efficient filming of movies and safety of actors, actresses, and property during potentially hazardous filming sequences.[6]

6. AMPTP argues that this rationale applies equally to the television medium because many programs for television, such as movies, news, and sporting events, require filming at remote locations and the coordination of large numbers of personnel and equipment.[7] AMPTP therefore proposes that the revised eligibility rules be expanded to include persons engaged in the production, video taping, or filming of television programs, and to those related entities who provide supporting services.[8] SIRSA supports further expansion of MPRS eligibility to include those engaged in the production of films not intended for final exhibition at theatrical outlets or for airing on television, such as educational and business training films.[9] Finally, AMPTP suggests that those entities who use radio facilities for on-the-scene communications at events such as parades and political rallies continue to be excluded from eligibility.[10]

7. The proposals set forth above would result in effective use of the Motion Picture Radio Service and would provide additional communications service options to those engaged in the production of both television programming and educational and business training films not produced for mass media distribution. We tentatively conclude, therefore, that the MPRS eligibility criteria should be expanded to include persons engaged in the production, video taping, or filming of television programs and to entities providing supporting services during production. We further believe that MPRS eligibility also should be extended to encompass the use of radio for the production of films not intended for theatrical or television distribution, such as educational and business training films, as well as generic training films for sale to companies. These proposed rule changes would preclude the use of private radio facilities for broadcast purposes.[11]

8. Expanding eligibility for the Motion Picture Radio Service will lead to development of state-of-the-art radio communications equipment by television and other mass communications program producers. We seek comment on the proposed revisions to the eligibility criteria in the Motion Picture Radio Service, as set forth in this *Notice*, and will consider alternatives that are consistent with our goals of providing for more effective use of this radio service by expanding eligibility both to those entities producing television programming and to those producing films for instructional and training purposes.

IV. INITIAL REGULATORY FLEXIBILITY ANALYSIS

A. Reason for action.

9. The Commission is proposing these rule changes to amend Section 90.69, 47 C.F.R. § 90.69, to permit currently non-eligible video production entities to provide radio communications service in the Motion Picture Radio Service for the purpose of the production, video taping or filming of motion pictures or television programs when the finished programs are intended for exhibition on television or in motion picture theaters, or are produced for other media of mass communications, or for instructional and training purposes. These changes will expand the benefits of private radio communications service to other users and provide flexibility in the use of this spectrum by existing users.

B. Legal basis.

10. Sections 4(i), 303(g), 303(r), 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

C. Reporting, recordkeeping, and other compliance requirements.

11. No new requirements will be imposed upon licensees because of this action.

D. Federal rules which overlap, duplicate, or conflict with this rule.

12. None.

E. Description, potential impact, and number of small entities involved.

13. Many small video and film production entities could be positively affected by this proposal because additional options would be made available to them. The precise number of small entities that will be affected is unknown. Additionally, expanded service opportunities will generate a demand for state-of-the-art communications equipment, a benefit for equipment manufacturers.

F. Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives.

14. None.

V. PAPERWORK REDUCTION ACT STATEMENT

15. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection or recordkeeping, labeling, disclosure or record retention requirements and will not increase the burden hours imposed upon the public.

VI. PROCEDURAL MATTERS

16. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that a matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first, 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

17. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. 47 C.F.R. § 1.1206.

18. Authority for issuance of this *Notice of Proposed Rule Making* is contained in sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 C.F.R. §§ 154(i) and 303(r). Interested persons may file comments on or before **June 3, 1991,** and reply comments on or before **June 18, 1991.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the *Report and Order*.

19. In accordance with the provision of Section 1.419 of the Commission's rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C. 20554.

20. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended, 47 U.S.C. §§ 154, 303, unless otherwise noted.

2. Section 90.69 is amended by revising paragraph (a) to read as follows:

§ 90.69 Motion Picture Radio Service

(a) **Eligibility**. The following are eligible to hold authorizations in the Motion Picture Radio Service to operate radio stations for transmission of communications essential to such activities of the licensee.

(1) Persons primarily engaged in the production, video taping or filming of motion pictures or television programs, including, but not limited to, movies, programs, news programs, sporting events, educational programming, or commercial training films, regardless of whether the films are produced primarily for final exhibition at theatrical outlets or on television, or for distribution though other mass communications or non-mass communications outlets;

(2) Persons providing services in support of eligibles in the Motion Picture Radio Service.

* * * * *

FOOTNOTES

[1] Public Notice of the filing was issued on July 2, 1990. *See* Public Notice No. 1820. Tight Ten Off Road Race Team filed comments in support of AMPTP's petition, and AMPTP filed a reply.

[2] Section 90.69 of the Rules, 47 C.F.R. § 90.69(a), now provides:

> (a) **Eligibility.** Persons primarily engaged in the production or filming of motion pictures are eligible to hold authorizations in the Motion Picture Radio Service to operate radio stations for transmission of communications essential to such activities of the licensee.

[3] Petition at 3.

[4] Letter from Mark E. Crosby, President, SIRSA, to Ralph A. Haller, Chief, Private Radio Bureau, March 27, 1990.

[5] Petition at 5.

[6] *Id.*

[7] *Id.* at 5-6.

[8] *Id.* at 7-8.

[9] *See* n.4 *infra*.

[10] AMPTP notes, in support, that these entities have never been eligible users of the Motion Picture Radio Service. Petition at 6-7.

[11] *See* 47 C.F.R. § 90.415(a), as set forth below:

> **§ 90.415 Prohibited uses.** Stations licensed under this part shall not: (a) Transmit program material of any kind for use in connection with broadcasting . . .

Thus, while private radio frequencies may be used to coordinate the video taping of news programming by television production personnel, these frequencies may not be used in electronic newsgathering (ENG), where actual news programming is transmitted from location to the studio for simultaneous or delayed television broadcast.

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-134

In the Matter of

Amendment of the Maritime Services Rules (Part 80) to revise the general exemption for small passenger vessels operated on domestic voyages.

REPORT AND ORDER

Adopted: March 25, 1991; Released: April 10, 1991

By the Commission:

I. INTRODUCTION

1. On March 8, 1990, we adopted a *Notice of Proposed Rule Making (Notice)* [1] in the above-captioned proceeding that pertains to U.S. passenger vessels of less than 100 gross tons (small passenger vessels). In the *Notice* we proposed to amend Part 80 of the Commission's Rules, 47 C.F.R. Part 80, to exempt such vessels not subject to the International Convention for the Safety of Life at Sea, 1974, T.I.A.S. 9352 (Safety Convention), from the radiotelegraph provisions of Part II of Title III of the Communications Act of 1934, as amended (Communications Act). This *Report and Order* adopts the proposed rules with certain modifications suggested by commenters. This action, by providing an additional category to the current general exemption, permits small passenger vessels to operate under the exemption beyond 100 nautical miles from the nearest land, provided the vessels are equipped with specified radio equipment.

II. BACKGROUND

2. The Commission, in conformance with the Communications Act and the Safety Convention, administers compulsory vessel radio requirements to promote the safety of life and property at sea. Subject to the Commission's authority to issue exemptions from these radio carriage requirements, all U.S. passenger vessels navigated in the open sea that carry or are certificated to carry more than 12 passengers[2] are required by Section 351(a) of the Communications Act, 47 U.S.C. § 351(a), to be equipped with a manual Morse code radiotelegraph station. Section 352(b)(3) of the Communications Act, 47 U.S.C. § 352(b)(3), permits the Commission to exempt from the above provision small passenger vessels, either individually or as a class, not operated on international voyages. The current general exemption contains a mileage limit of 100 nautical miles from land. [3]

3. As we discussed in our *Notice*, some small passenger vessels operate beyond the 100 nautical mile limit and are appropriate candidates for exemption. In such cases the Commission, normally in cooperation with the U.S. Coast Guard, has granted an individual exemption for each vessel. Our proposed revisions of the general exemption followed from the premise that adequate safety communications can be ensured on voyages beyond 100 nautical miles from land, just as they are for vessels operated under the current general exemption.[4] This can be accomplished by the carriage of either satellite communications equipment or HF single sideband radiotelephone equipment, in lieu of manual Morse code radiotelegraph equipment. These technologies offer radio performance equal to or superior to manual Morse code radiotelegraphy, and are easier to operate.[5] These technologies are also favored in the forthcoming Global Maritime Distress and Safety System (GMDSS), which will be phased in worldwide from 1992 to 1999.[6] The GMDSS, of which the United States has been a strong advocate, specifies equipment carriage requirements for certain vessels operated on international voyages. The GMDSS will replace the existing international manual Morse code ship-to-ship radiotelegraph system with a fully automated ship-to-shore distress alerting system using advanced satellite and terrestrial data communications systems.

4. As noted above, in our *Notice* we proposed to revise the general exemption for small passenger vessels contained in Section 80.836(a) of the Commission's Rules, 47 C.F.R. § 80.836(a), to permit voyages beyond 100 nautical miles from land. We proposed to require vessels operated under the general exemption to carry additional equipment in a "step" or tiered approach: at increasingly greater distances from land, vessels would be required to carry additional radio equipment. We noted that the revised general exemption was patterned on the GMDSS, and requested comment[7] on the proposed frequency bands to be used and on the proposed equipment requirements for the various distances, including the power, receiver sensitivity, and antenna requirements. We also sought comment on whether the rules pertaining to small passenger vessels should permit greater flexibility of operations. We asked, for example, whether we should permit a ship earth station to be used in lieu of a single sideband radiotelephone for small passenger vessels operated more than 20 nautical miles from land, as proposed for vessels operated more than 200 nautical miles from land. We asked whether the general exemption should restrict a vessel's maximum distance from land in instances where the distance was otherwise approved by the Coast Guard.

III. DISCUSSION

5. We received four comments, and no reply comments. The commenters were: American Canadian Caribbean Line, Inc.; U.S. Coast Guard; Communications Satellite Corporation (COMSAT)[8]; and Radio Technical Commission for Maritime Services (RTCM). All commenters support the proposal in general, and their specific suggestions are discussed below. One recurrent suggestion is that the general exemption be crafted to track even more closely the requirements of the GMDSS. We believe that the GMDSS represents a marked improvement over the current distress and safety system and agree that the small passenger vessel general exemption should, where possible, closely follow GMDSS requirements. As noted by

RTCM, the subject vessels might be operated under conditions that necessitate a level of distress and safety capability comparable to vessels subject to the GMDSS.[9] We have not, however, followed the GMDSS approach in its entirety.[10] In particular, we have attempted to avoid creating additional burdens on licensees operating under the current general exemption, where such additional requirements would not yield safety benefits beyond those resulting from the general exemption as here revised.[11] We address the issues raised in the comments below.

A. Distance Categories Within the Exemption

6. RTCM recommends that we eliminate the general exemption categories proposed for vessels operated 100-200 and 200-500 nautical miles from land, and substitute a category for vessels "operated more than 100 nautical miles from the nearest land and within the coverage area of an INMARSAT geostationary satellite in which continuous alerting is available.[12] These changes would create a new category more in conformance with the GMDSS category "sea area A3.[13] Consistent with RTCM's recommendation, the Coast Guard states that, to the extent practicable, the basis of radiocommunications carriage requirements should be the GMDSS.[14] We agree that the additional mileage authority contained in the revised general exemption should track GMDSS requirements, and note that the Communications Act does not contain a mileage limit for exemptions granted to small passenger vessels operated on domestic voyages.[15] We have therefore modified the general exemption to eliminate the proposed 100-200 and 200-500 nautical mile categories. The revised general exemption contains a new category specifying that small passenger vessels may operate beyond 100 nautical miles from land, with no mileage restriction, provided the vessels are equipped with specified radio equipment.

B. Duplication of Equipment

7. COMSAT and RTCM believe that, for vessels operated under the revised general exemption beyond 100 nautical miles, duplication of shipboard MF, HF, or satellite equipment is not warranted. They note, however, that the GMDSS, which is based on vessels being able to provide distress signals to shore facilities, generally requires that every compulsory vessel have two separate and independent means to perform the alerting function, with each means utilizing different radiocommunications systems.[16] RTCM recommends that, under the revised general exemption, vessels meet this GMDSS requirement by carrying a 406 MHz satellite emergency position-indicating radiobeacon (EPIRB)[17] in addition to an installed radio transmitter.[18] We conclude that, for small passenger vessels, an adequate alerting capability can be ensured by requiring such vessels to carry a 406 MHz EPIRB and additionally either an HF single sideband radiotelephone or a ship earth station, and we have revised the general exemption accordingly.[19] This approach also addresses COMSAT's concern[20] that in this context we not establish a preference for HF terrestrial communications over satellite communications.

C. Maritime Safety Information

8. The Coast Guard and RTCM recommend that the exempted vessels be capable of receiving maritime safety information. In particular, both commenters favor two systems through which the GMDSS will provide such information: terrestrial NAVTEX broadcasts and satellite SafetyNET broadcasts.[21] NAVTEX is a worldwide, automated system in which shore stations can transmit up to 200 nautical miles on 518 kHz to inexpensive, dedicated teleprinters kept on board vessels. The proposed SafetyNET system, which the International Maritime Satellite Organization (INMARSAT) plans to provide, is a satellite communications service that would be available to vessels equipped with ship earth stations.

9. The Coast Guard, which already operates eleven NAVTEX shore stations domestically,[22] recommends that NAVTEX reception capability be required of vessels operated beyond 100 nautical miles from land under the revised general exemption.[23] The Coast Guard also recommends that we require that medium frequency radiotelephone installations be capable of receiving and transmitting on the frequency 2670 kHz, which is the Coast Guard's liaison and safety information channel.[24] We agree with the Coast Guard, and have included these two requirements in the revised general exemption. The second requirement, concerning operation on 2670 kHz, will affect all subject vessels required to carry a medium frequency installation and will afford such vessels the capability to receive marine safety transmissions.

10. The Coast Guard and RTCM also recommend that we require participation in the SafetyNET system and place in our rules language pertaining to the future implementation of the system.[25] Because the SafetyNET system is not yet operational and because the technical standards of the system are still being debated internationally, we will not address the system further at this time. We will consider revisiting this issue when the SafetyNET system is operational.

D. Ship Earth Stations

11. Our proposal specified that ship earth stations operated under the revised general exemption had to be "capable of voice operation." We are persuaded by the Coast Guard and COMSAT[26] that the exemption should also permit use of the new data-only ship earth station, "INMARSAT-C." We conclude that both of these ship earth stations, as well as future versions of the INMARSAT terminals, will provide a valuable means to alert shore facilities of distress situations. We will permit use of these stations under the revised general exemption provided that the stations meet the requirements of our equipment authorization rules,[27] which include the requirement of type approval by INMARSAT.[28]

IV. CONCLUSION

12. In summary, we have revised the general exemption for small passenger vessels to include an additional exemption category permitting vessel operation beyond 100 nautical miles from land, provided specified radio equipment is carried. This action will ensure that adequate safety communications are maintained on these longer voyages, and will reduce the administrative burdens imposed on the maritime public and on the Commission by making it unnecessary that vessel operators apply for individual radiotelegraph exemptions.

V. FINAL REGULATORY FLEXIBILITY ANALYSIS

13. Pursuant to the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), *see* 5 U.S.C. § 604, our final analysis is as follows:

Need for, and objectives of, this action.

14. This action pertains to U.S. small passenger vessels operated on domestic voyages. For such vessels, the revised general exemption removes the current mileage limit contained in the general exemption from radiotelegraph requirements, thus increasing the distance within which the vessels may operate without first having to obtain formal individual exemptions from the Commission. This action establishes a tiered scheme of radiocommunications equipment requirements, with additional equipment required at greater distances from land. This action can ensure that the vessels carry adequate safety communications equipment, and can help avoid unnecessary administrative procedures for both licensees and the Commission.

Discussion of issues raised by the public comments in response to the Initial Regulatory Flexibility Analysis.

15. One commenter, American Canadian Caribbean Line, Inc., states that the vehicle of a revised general exemption for small passenger vessels is a reasonable way to eliminate an unconstructive, costly administrative burden on licensees such as itself. The Commission agrees, and we note that any impact of this action on small passenger vessels licensees, some of whom are small entities, will be to lessen the cost of doing business. The equipment required of vessels under the voluntary general exemption will be the same as the equipment that would be required under individual exemptions.

Significant alternatives considered and rejected.

16. The Commission did not reject any alternative designed to minimize the economic impact of the amended rules on small entities.

VI. PAPERWORK REDUCTION ACT

17. The rule amendments adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to decrease the information collection burden that the Commission imposes on the public. The revised general exemption, which permits small passenger vessels to operate beyond 100 nautical miles from land without first having to obtain formal individual exemptions from the Commission, can reduce unnecessary administrative procedures for both licensees and the Commission. Implementation of this reduction in the information collection burden is subject to approval by the Office of Management and Budget, as prescribed by the Act.

VII. ORDERING CLAUSES

18. Accordingly, IT IS ORDERED that, pursuant to the authority contained in Sections 4(i), 303(r), 352(b)(3) and 358(a)(3) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(r), 352(b)(3) and 358(a)(3), Part 80 of the Commission's Rules IS AMENDED as set forth in the Appendix below.

19. IT IS FURTHER ORDERED that this *Report and Order* will be effective on **June 19, 1991.**

20. IT IS FURTHER ORDERED that a copy of this *Report and Order* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

21. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 80 of Chapter I of Title 47 of Code of Federal Regulations is amended as follows:

Part 80 - STATIONS IN THE MARITIME SERVICES.

1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064 - 1068, 1081 - 1105, as amended; 47 U.S.C. 151 - 155, 301 - 609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. In Section 80.836, the section heading and paragraph (a) are revised to read as follows:

§ 80.836 General and individual vessel exemptions.

(a) All U.S. passenger vessels of less than 100 gross tons, not subject to the radio provisions of the Safety Convention, are exempt from the radiotelegraph provisions of Part II of Title III of the Communications Act, provided that the vessels are equipped with a radiotelephone installation fully complying with the Commission's Rules and with the provisions of Part III of Title III of the Communications Act.

* * * * *

3. In Section 80.905, the section heading is revised, paragraphs (a)(2) through (c) are redesignated as paragraphs (b) through (d), a new paragraph (a) is added, paragraph (a)(1) is revised, and new paragraphs (a)(2) and (a)(3)(i)-(ix) are added to read as follows:

§ 80.905 Vessel radio equipment.

(a) Vessels subject to Part III of Title III of the Communications Act that operate in the waters described in § 80.901 must, at a minimum, be equipped as follows:

(1) Vessels operated solely within the communications range of a VHF public coast station or U.S. Coast Guard station that maintains a watch on 156.800 MHz while the

vessel is navigated must be equipped with a VHF radiotelephone installation. Vessels in this category must not operate more than 20 nautical miles from land.

(2) Vessels operated beyond the 20 nautical mile limitation specified in paragraph (a)(1) of this section, but not more than 100 nautical miles from the nearest land, must be equipped with a medium frequency transmitter capable of transmitting J3E emission and a receiver capable of reception of J3E emission within the band 1605 to 2850 kHz, in addition to the VHF radiotelephone installation required by paragraph (a)(1) of this section. The medium frequency transmitter and receiver must be capable of operation on 2670 kHz.

(3) Vessels operated more than 100 nautical miles from the nearest land must:

(i) be equipped with a VHF radiotelephone installation;

(ii) be equipped with a radiotelephone transmitter and receiver meeting the requirements of paragraph (a)(2) of this section; and

(iii) be equipped with either: (A) a single sideband radiotelephone capable of operating on any distress and safety frequency in the medium frequency and high frequency bands listed in §§ 80.369(a) and (b), on any of the ship-to-shore calling frequencies in the high frequency bands listed in § 80.369(d), and on at least four of the automated mutual-assistance vessel rescue (AMVER) system HF duplex channels; or (B) if operated in an area within the coverage of an INMARSAT maritime mobile geostationary satellite in which continuous alerting is available, an INMARSAT ship earth station meeting the equipment authorization rules of Parts 2 and 80 of this Chapter;

(iv) be equipped with a reserve power supply meeting the requirements of §§ 80.917(b), 80.919, and 80.921, and capable of powering the single sideband radiotelephone or the ship earth station (including associated peripheral equipment) required by paragraph (a)(3)(iii) of this section;

(v) be equipped with a NAVTEX receiver conforming to the following performance standards: IMO Resolution A.525(13) and CCIR Recommendation 540;

(vi) be equipped with a 406 MHz satellite emergency position-indicating radiobeacon (EPIRB) meeting the requirements of § 80.1061;

(vii) be equipped with a radiotelephone distress frequency watch receiver meeting the requirements of § 80.269;

(viii) be equipped with an automatic radiotelephone alarm signal generator meeting the requirements of § 80.221; and

(ix) participate in the AMVER system on all voyages of more than 24 hours.

* * * * *

4. Section 80.909 is revised in its entirety to read as follows:

§ 80.909 Radiotelephone transmitter.

(a) The medium frequency transmitter must have a peak envelope output power of at least 60 watts for J3E emission on 2182 kHz and at least one ship-to-shore working frequency within the band 1605 to 2850 kHz enabling communication with a public coast station if the region in which the vessel is navigated is served by a public coast station operating in this band.

(b) The single sideband radiotelephone must be capable of operating on maritime frequencies in the band 1605 to 27500 kHz with a peak envelope output power of at least 120 watts for J3E emission and H3E emission on 2182 kHz and J3E emission on the distress and safety frequencies listed in § 80.369(b).

(c) The transmitter complies with the power output requirements specified in paragraphs (a) or (b) when:

(1) The transmitter can be adjusted for efficient use with an actual ship station transmitting antenna meeting the requirements of § 80.923; and

(2) The transmitter, with normal operating voltages applied, has been demonstrated to deliver its required output power on the frequencies specified in paragraphs (a) or (b) of this Section into either an artificial antenna consisting of a series network of 10 ohms effective resistance and 200 picofarads capacitance or an artificial antenna of 50 ohms nominal impedance. An individual demonstration of power output capability of the transmitter, with the radiotelephone installation normally installed on board ship, may be required.

(d) The single sideband radiotelephone must be capable of transmitting clearly perceptible signals from ship to shore. The transmitter complies with this requirement if it is capable of enabling communication with a public coast station on working frequencies in the 4000 to 27500 kHz band specified in § 80.371(b) under normal daytime operating conditions.

5. In Section 80.913, paragraphs (b) through (f) are redesignated as paragraphs (c) through (g), a new paragraph (b) is added, and newly redesignated paragraphs (e) and (f) are revised to read as follows:

§ 80.913 Radiotelephone receivers.

* * * * *

(b) If a single sideband radiotelephone installation is provided, the receiver must be capable of reception of H3E and J3E emissions on 2182 kHz and J3E emission on any receiving frequency authorized pursuant to § 80.909.

* * * * *

(e) Any receiver provided as a part of the radiotelephone installation must have a sensitivity of at least 50 microvolts in the case of MF equipment, and 1 microvolt in the case of HF or VHF equipment.

(f) The receiver required in paragraphs (a), (b) or (c) of this section must be capable of efficient operation when energized by the main source of energy. When a reserve source of energy is required pursuant to § 80.905 or § 80.917, the receiver must also be capable of efficient operation when energized by the reserve source of energy.

* * * * *

6. Section 80.923 is amended by revising the first sentence to read as follows:

§ 80.923 Antenna system.

An antenna must be provided in accordance with the applicable requirements of § 80.81 which is as efficient as practicable for the transmission and reception of radio waves. * * *

7. Section 80.931 is amended by revising the first sentence to read as follows:

§ 80.931 Test of radiotelephone installation.

Unless normal use of the radiotelephone installation demonstrates that the equipment is in proper operating condition, a test communication on a required frequency in the 1605 to 27500 kHz band or the 156 to 162 MHz band must be made by a qualified operator each day the vessel is navigated. * * *

FOOTNOTES

[1] *Notice of Proposed Rule Making*, 5 FCC Rcd 1943 (1990).

[2] *See* 47 U.S.C. § 153(w)(2), (4) (defining passenger vessel).

[3] For such vessels of less than 100 gross tons, the Commission in 1957 adopted a general exemption permitting operation up to 50 nautical miles from land. *Order*, adopted May 8, 1957, 22 Fed.Reg. 3441 (May 16, 1957). In 1970, the Commission extended this maximum distance to 100 nautical miles, which has remained the limit. *Order*, 21 FCC 2d 819 (1970); *see* 47 C.F.R. § 80.836(a).

[4] By bringing appropriate vessels within the scope of a general exemption, we reduce the administrative burdens imposed on the maritime public and on the Commission by making it unnecessary that vessel operators apply for individual radiotelegraph exemptions.

[5] Equipping a vessel with modern methods of communication, rather than with manual Morse code equipment, does not reduce the vessel's safety nor the safety of other vessels. Moreover, because knowledge of Morse code is not required to operate the modern systems, almost any person on board is a potential operator, and this provides greater flexibility in distress situations.

[6] *See generally Notice of Proposed Rule Making, Amendment of Parts 13 and 80 of the Commission's Rules to implement the Global Maritime Distress and Safety System (GMDSS) to improve the safety of life at sea*, PR Docket No. 90-480, 5 FCC Rcd 6212 (1990).

[7] Comments and reply comments were initially due by May 21 and June 5, 1990, respectively. These due dates were later extended to June 25 and July 16, 1990. *Order*, 5 FCC Rcd 3264 (1990).

[8] This comment was filed two days late, with a motion to accept same. We have accepted the filing. *See* 47 C.F.R. § 1.46(b).

[9] Comments of RTCM at 3.

[10] We have not, for example, required digital selective calling (DSC) capability for radiotelephone transceivers under the revised general exemption. DSC, once implemented, will provide an automated signalling system that can be used to establish radio contact with a station or group of stations in the maritime radio services.

[11] Nor have we specifically addressed those suggestions by commenters pertaining to mandatory requirements that are unchanged by this present action, such as watch requirements.

[12] Comments of RTCM at 5-6.

[13] The GMDSS utilizes four "sea areas" of vessel operation to determine which GMDSS equipment elements are required. In general, Category A3 encompasses the cumulative footprints of the satellites of the International Maritime Satellite Organization (INMARSAT), minus distances closer to land that can be reached by shore-based VHF and MF transmissions. *See generally Notice of Proposed Rule Making, supra* note 6, at para. 10.

[14] Comments of Coast Guard at 3.

[15] *See* 47 U.S.C. § 352(b)(3).

[16] Comments of COMSAT at 2; Comments of RTCM at 6-7.

[17] The 406 MHz EPIRB provides satellite distress alerting through the COSPAS-SARSAT system, a joint international satellite-based search and rescue system established by the United States, USSR, Canada, and France. *See Notice of Proposed Rule Making, supra* note 6, at para. 12 & n. 5; *Report & Order*, PR Docket No. 86-424, 3 FCC Rcd 5406 (1988).

[18] Comments of RTCM at 7.

[19] We have also, however, required that vessels operated on voyages of more than 24 hours participate in the Coast Guard's automated mutual-assistance vessel rescue (AMVER) system. This free, voluntary, world-wide system uses computers to track a vessel's position throughout its voyage. In the event of an emergency, the system relays the vessel's projected location and other relevant data to search and rescue organizations. For vessels subject to the AMVER requirement under the revised general exemption, we require capability to transmit and receive on the AMVER HF frequencies.

[20] Comments of COMSAT at 3.

[21] Comments of Coast Guard at 5-7; Comments of RTCM at 7-8.

[22] The transmitters are located near the following: Kodiak, AK; Long Beach, CA; San Francisco, CA; Miami, FL; Guam; Honolulu, HI; New Orleans, LA; Boston, MA; Astoria, OR; San Juan, PR; and Chesapeake, VA. *See* Comments of Coast Guard at 6.

[23] *Id.* The proposed U.S. implementation date for the NAVTEX requirement under the GMDSS is August 1, 1993, in accordance with international requirements. *See Notice of Proposed Rule Making, supra* note 6, at para. 20.

[24] Comments of Coast Guard at 7.

[25] Comments of Coast Guard at 6-7; Comments of RTCM at 7-8.

[26] Comments of Coast Guard at 7-8; Comments of COMSAT at 3-4.

[27] We have before us a petition for rule making, *see* RM-7512, filed on July 30, 1990, requesting that we amend Section 80.203(f) of the Commission's Rules, 47 C.F.R. § 80.203(f), to include provision for the INMARSAT-C within our equipment authorization procedures. The INMARSAT-A is already referenced within § 80.203(f).

[28] *See generally Notice of Proposed Rule Making, supra* note 6, at para. 25 & n. 9, para. 31 & nn. 11-12, and appendix (proposed § 80.1101).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 90-222

In the Matter of

Amendment of Part 95	RM-6683
of the Rules regarding	RM-6746
the technical standards	
for transmitters operating	
in the 72-76 MHz band	
in the Radio Control (R/C)	
Radio Service.	

REPORT AND ORDER

Adopted: April 1, 1991; Released: April 10, 1991

By the Commission:

I. INTRODUCTION

1. On April 18, 1990, we adopted a *Notice of Proposed Rule Making (Notice)* [1] in the above-captioned proceeding. In the *Notice*, we proposed to reduce the level of permitted unwanted radiation and to improve the frequency stability of transmitters operating in the 72-76 MHz (VHF) band that are used for remote control of model aircraft, boats, and cars (models). We proposed these new technical standards[2] so that the VHF channels could be used more efficiently. This *Report and Order* adopts the technical standards and the implementation schedule substantially as proposed in the *Notice*.

II. BACKGROUND

2. In 1982, we made eighty channels in the VHF band available on a secondary basis for radio remote control of models. [3] Because of the current technical standards for transmitters, however, simultaneous adjacent channel operation at the same location is often not possible. Consequently, all of the VHF channels may not be available to model aircraft enthusiasts at a single location. Our proposal sought to rectify this situation by requiring a reduction in the level of permitted unwanted radiation and by improving frequency stability for such VHF transmitters.

3. The implementation schedule we proposed for the narrowband standards was as follows: Effective March 1, 1992, all transmitters designed to operate in the Radio Control (R/C) Radio Service VHF band and submitted to the Commission for approval under its equipment authorization program, or manufactured in, or imported into the United States must comply. Effective March 1, 1993, marketing of R/C transmitters that have not been authorized pursuant to the narrowband standards are prohibited. Transmitters purchased before March 1, 1993, that meet only wideband standards can continue to be used. Four commenters support our proposal, but suggest other timetables for its implementation. Two commenters oppose it.[4] One reply comment was filed in the proceeding.[5]

III. DISCUSSION

4. The Academy of Model Aeronautics, Inc. (AMA) supports our proposal because the use of transmitters meeting the narrowband standards will allow modelers to use all authorized VHF channels at a single location, rather than every other channel as is often the case at present. The AMA states that it does not agree with our implementation timetable, however, because the vast majority of manufacturers have been producing narrowband transmitters since January 1, 1988. It believes that a transition period for implementation of the narrowband standards is unnecessary.[6] Mr. Glenn Whidden also supports the proposal but suggests that implementation be accelerated so that manufactured and imported transmitters be required to meet the narrowband standards by March 1, 1991, and that marketing of wideband transmitters be prohibited effective March 1, 1992. He concurs, however, in our proposal to grandfather existing wideband transmitters.[7] Mr. Charles Ahern recommends that use of wideband transmitters be terminated immediately.[8] Mr. Fred Marks suggests that use of wideband transmitters end in 1992.[9]

5. Mr. Weston Moore opposes the narrowband standards. He suggests that the AMA may have requested the narrowband standards so that all the VHF channels could be used during its annual flying model competition. He believes that a majority of modelers neither want nor need the narrowband standards.[10] Mr. L. F. Randolph also opposes the proposal. He states that adjacent channel interference is a problem of reception rather than transmission. He states that receiver tuning alone can eliminate interference from an adjacent channel.[11] In its reply comment, the AMA counters Mr. Randolph's suggestion by pointing out that use of narrowband transmitters is the only feasible way to reduce interference from a particular transmitter to other radio systems operating in the same geographical area.[12] In addressing Mr. Moore's comment, the AMA argues that use of existing wideband transmitters would not have to be discontinued, but rather would be grandfathered under the Commission's proposal.[13]

6. Although the AMA does not believe that grandfathering of wideband transmitters is necessary, it, nonetheless, has frequency management plans for use of the channels that are designed to facilitate the safe and continued operation of wideband transmitters. The AMA states that those plans will permit typical weekend modelers to continue to use their existing wideband transmitters without causing interference to narrowband transmitter radio control systems. In congested environments, such as modelers' competitions or in industrial metropolitan areas, however, the AMA plans either to restrict or prohibit use of wideband transmitters.[14]

7. After reviewing the comments, we conclude that the public interest would be served by amending the Radio Control (R/C) Radio Service Rules as proposed. We are convinced that all of the available R/C channels are not currently available to modelers at a single location because of adjacent channel interference from wideband transmitters. We believe that the narrowband standards will reduce the amount of adjacent channel interference

to an extent that will permit more of the available channels to be used simultaneously at major events. In fairness to users of both wideband and narrowband transmitters, we will grandfather existing wideband transmitters until March 1, 1998.

8. With respect to Mr. Randolph's comments regarding reception, the Commission does not regulate the performance standards of Radio Control (R/C) Radio Service receivers.[15] Improvements in receiver front end bandwidth, selectivity, and adjacent channel rejection could help in solving some of the adjacent channel interference problems currently being experienced by modelers. Users should encourage manufacturers to provide such improvements. The reduction in unwanted radiation and improved frequency stability for transmitters herein ordered should reduce adjacent channel interference on the VHF channels.

9. We are not convinced that we should shorten the transition period that we proposed for the rule changes to become effective. It is only fair to give manufacturers a sufficient period of time before imposing new technical standards. The effective date of March 1, 1992, for manufacturers and importers, and the effective date of March 1, 1993, for the prohibition on marketing of transmitters meeting the current technical standards, are reasonable transition periods. Finally, as stated above, we want to accommodate both wideband and narrowband transmitter users. Wideband users should be given an opportunity to amortize their equipment investment. On the other hand, narrowband users need to be able to use all the additional channels without restriction. Thus, we will allow wideband transmitters purchased before March 1, 1993, to be used until March 1, 1998, at which time their use will be terminated. The cutoff date of March 1, 1998, represents a reasonable compromise between the competing needs of the wideband and narrowband transmitter users.

IV. CONCLUSION

10. With the modification noted herein, we adopt the rule changes proposed in the *Notice* to amend the Technical Regulations for the Radio Control (R/C) Radio Service (47 C.F.R. Part 95, Subpart E) to reduce the permitted level of unwanted radiation and to improve the frequency stability of transmitters operating in the 72-76 MHz band that are used for remote control of models. These rule changes will make it possible to use the channels more efficiently.

V. REGULATORY FLEXIBILITY ACT FINAL ANALYSIS

11. Pursuant to the Regulatory Flexibility Act of 1980, 5 U.S.C. §§ 601-612, our final analysis is as follows:

Need and Purpose of This Action

12. This action is needed in order to promote a more effective use of the radio spectrum by making it possible to use all the channels that are currently available for model operations at the same location. The purpose of this action is to establish narrowband technical standards for transmitters operating in the 72-76 MHz band used for the remote control of models.

Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis

13. We solicited comments from manufacturers of R/C transmitters in order to determine how many companies would produce and market 72-76 MHz transmitters. No manufacturers, distributors, or retailers responded to our *Notice*. Nevertheless, we expect that these final rules will result in some consumer demand for new R/C transmitters. The revenues of some small business entities engaged in manufacturing and marketing of such transmitters, therefore, will be increased.

14. Manufacturers that must redesign their equipment will also be affected. A transition period has been allowed to minimize any economic impact upon such manufacturers. Likewise, a transition period has been provided so that distributors and retailers can clear their inventories.

Significant Alternatives Considered and Rejected

15. None.

VI. PAPERWORK REDUCTION ACT

16. The rules adopted herein have been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520, and found to impose a new or modified information collection requirement on the public. Implementation of any new or modified requirement will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VII. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED that effective **June 21, 1991,** Part 95 of the Commission's Rules, 47 C.F.R. Part 95, IS AMENDED as set forth in the Appendix below. Authority for this action is found in 47 U.S.C. §§ 154(i), 302, and 303(f) and (r).

18. IT IS FURTHER ORDERED that a copy of this *Report and Order* shall be sent to the Chief Counsel for Advocacy of the Small Business Administration.

19. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 95 of Chapter I of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 95 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303.

2. Section 95.623 is amended by revising paragraph (b) and adding a new paragraph (c) to read as follows:

§ 95.623 R/C transmitter channel frequencies.

* * * * *

(b) Each R/C transmitter that transmits in the 26-27 MHz frequency band with a mean TP of 2.5 W or less and that is used solely by the operator to turn on and/or off a device at a remote location, other than a device used solely to attract attention, must be maintained within a frequency tolerance of 0.01%. All other R/C transmitters that transmit in the 26-27 MHz frequency band must be maintained within a frequency tolerance of 0.005%. Except as noted in paragraph (c), R/C transmitters capable of operation in the 72-76 MHz band must be maintained within a frequency tolerance of 0.005%.

(c) All R/C transmitters capable of operation in the 72-76 MHz band that are manufactured in or imported into the United States, on or after March 1, 1992, or are marketed on or after March 1, 1993, must be maintained within a frequency tolerance of 0.002%. R/C transmitters operating in the 72-76 MHz band and marketed before March 1, 1993, may continue to be operated with a frequency tolerance of 0.005% until March 1, 1998.

3. In Section 95.631(b), the entry in the table for R/C transmitters is revised, the present Note to the table is designated as Note 1 and Note 2 is added to the table, paragraphs (b)(7) and (8) are amended by adding the number 10 before the word log, and paragraphs (b)(10), (11), and (12) are added to read as follows:

§ 95.631 Unwanted radiation.

* * * * *

(b) * * *

Transmitter	Emission type	Applicable paragraphs
* * * * *		
R/C		
27 MHz band	As specified in § 95.627(b)	(1), (3), (7)
72-76 MHz band	As specified in § 95.627(b)	(1), (3), (7), (10), (11), (12)

* * * * *

NOTE 1: Unwanted RF radiation may be stated in mean power or in peak envelope power, provided it is stated in the same parameter as TP.

NOTE 2: Paragraphs (1), (10), (11), and (12) apply to transmitters operating in the 72-76 MHz band that are manufactured or imported into the United States on or after March 1, 1992, or marketed on or after March 1, 1993.

Paragraphs (1), (3), and (7) apply to transmitters operating in the 72-76 MHz band that are manufactured or imported into the United States before March 1, 1992, or marketed before March 1, 1993.

R/C transmitters operating in the 72-76 MHz band that are marketed before March 1, 1993, and that meet the emission standards specified in paragraphs (1), (3), and (7), may continue to be operated until March 1, 1998.

* * * * *

(7) At least 43 + 10 $\log_{10}$ (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

(8) At least 53 + 10 $\log_{10}$ (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

* * * * *

(10) At least 45 dB on any frequency removed from the center of the authorized bandwidth by more than 100% up to and including 125% of the authorized bandwidth.

(11) At least 55 dB on any frequency removed from the center of the authorized bandwidth by more than 125% up to and including 250% of the authorized bandwidth.

(12) At least 56 + 10 $\log_{10}$ (TP) dB on any frequency removed from the center of the authorized bandwidth by more than 250%.

* * * * *

FOOTNOTES

[1] 5 FCC Rcd 2763 (1990).

[2] In this proceeding, the term "narrowband" refers to transmitters complying with our proposed technical standards. The term "wideband" refers to transmitters produced under the current technical standards.

[3] *See* Report and Order, General Docket 82-181, 47 Fed. Reg. 51875 (1982).

[4] Timely comments were filed by The Academy of Model Aeronautics, Inc., Weston Moore, L. F. Randolph, and Glenn Whidden. In the interest of a complete record, we accept the late comments of Charles Ahern and Fred Marks.

[5] The reply comment was filed by The Academy of Model Aeronautics, Inc.

[6] Comments of AMA at 2, 5, and 6.

[7] Comments of Whidden at 5.

[8] Comments of Ahern at 1.

[9] Comments of Marks at 2.

[10] Comments of Moore at 1 and 2.

[11] Comments of Randolph at 1 and 2.

[12] AMA's reply comments at 2.

[13] AMA's reply comment at 4.

[14] AMA's reply comments at 4 and 5.

[15] Our rules, however, do apply to radio frequency emissions generated by R/C receivers. *See* Part 15 of the Commission's Rules, 47 C.F.R. Part 15. Manufacturers are permitted to design these receivers to whatever performance standards they wish.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-577

In re Applications:

NATIONAL COMMUNICATIONS INDUSTRIES	File No. BPH-870831MF
LIBERTY PRODUCTIONS, A LIMITED PARTNERSHIP	File No. BPH-870831MI
WILLSYR COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870831MJ
BILTMORE FOREST BROADCASTING FM, INC.	File No. BPH-870831MK
SKYLAND BROADCASTING COMPANY	File No. BPH-870831ML
ORION COMMUNICATIONS LIMITED	File No. BPH-870901ME
HARBINGER BROADCASTING COMPANY	File No. BPH-870901MF

For a Construction Permit
For a New FM Station in
Biltmore Forest, North Carolina

Appearances

J. Richard Carr and *Audrey L. Allison*, on behalf of National Communications Industries; *Timothy K. Brady*, on behalf of Liberty Productions, A Limited Partnership; *Stephen T. Yelverton*, on behalf of Willsyr Communications Limited Partnership; *Donald J. Evans* and *Theresa Zeterberg*, on behalf of Biltmore Forest Broadcasting FM, Inc.; *Robert A. DePont* and *Anna E. Goodwin*, on behalf of Skyland Broadcasting Company; *Eugene F. Mullin*, *Nathaniel F. Emmons*, and *Mary Lawless Plantamura*, on behalf of Orion Communications Limited; *William K. Keane*, on behalf of Harbinger Broadcasting Company.

DECISION

Adopted: March 15, 1991; Released: April 8, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

Board Chairman MARINO:

1. After a trial-type comparative hearing before Administrative Law Judge Walter Miller (ALJ), Orion Communications Limited (Orion) was declared the winner because Orion "will offer the best practicable service to the public." *Initial Decision*, 5 FCC Rcd 2862, 2881 (1990) (*I.D.*). Of the seven remaining applicants in the case, only Orion and Harbinger Broadcasting Company (Harbinger) were awarded 100% quantitative integration credit for participation of ownership in the proposed management of the station. Ultimately, Orion prevailed because of its qualitative enhancements for long-term local residence (100%), civic activities (100%), female ownership (30%), and broadcast experience (100%). *See* paras. 19, 26 below.

2. The six unsuccessful applicants have filed exceptions, and oral argument was held on October 12, 1990. The questions presented are: (a) whether disqualifying antenna site issues should have been resolved against Biltmore Forest Broadcasting FM, Inc. (Biltmore) and Liberty Productions, A Limited Partnership (Liberty), respectively; (b) whether the comparative credit of Willsyr Communications Limited Partnership (Willsyr) should have been reduced to 0%, or 20%, National Communications Industries (National) to 50%, and Skyland Broadcasting Company (Skyland) to 76%; and (c) whether Orion is entitled to 100% quantitative credit and is the qualitatively superior comparative applicant. On review of the record, we affirm the ALJ's selection in this case.

SITE AVAILABILITY ISSUES

3. Site availability certification should deter speculative applications. *Processing of FM and TV Broadcast Applicants*, 50 Fed. Reg. 19936, published May 13, 1985 (at para. 22). There the Commission held:

> . . . although an applicant need not necessarily go as far as to demonstrate absolute assurance, an applicant should be able to show some reasonable assurance that the site for each proposed transmitting antenna is available. *A mere possibility that a site will be available is not sufficient. William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974). *Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance in good faith that the proposed site will be available for the intended purpose.*

In *Radio Delaware Inc.*, 4 FCC 8630, 8631 (Rev. Bd. 1989), we held:

> It is axiomatic that an applicant must have reasonable assurance of the availability of its proposed transmitter site when it originally files its application. [Multiple citations omitted.] Although reasonable assurance may be acquired in numerous ways,

it requires at minimum "a meeting of the minds resulting in some firm understanding as to the site's availability." *Genesee Communications, Inc.*, 3 FCC Rcd 3595 (Rev. Bd. 1988).

4. If the transmitter site becomes unavailable after an applicant certifies it has reasonable assurance, that significant change must be reported within thirty days, in accordance with 47 CFR 1.65. *See Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751, 5753 n. 9 (1990); *Bay Television, Inc.*, 95 FCC 2d 181, 182 (Rev. Bd. 1983). Any attempt to amend to specify a new site must demonstrate "due diligence," which the Commission has held, dates from "the time the applicant is, or should have been, apprised of the problem requiring amendment." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982).

5. *Biltmore Forest.* Biltmore Forest certified that a site was available on August 31, 1987, and that it had a letter of consent from the site owner. Less than a month and one half later, the site was sold. *I.D.*, paras. 9-10. Significantly, the ALJ found, and Biltmore does not dispute the fact (*see* Br. at 5): "In the summer of 1988, a full six months before this case was designated for hearing, [Biltmore] learned that their transmitter site land had been sold . . . ." *I.D.* at para. 11. This fact, however, was not reported to the Commission; nor was the application promptly amended to specify a new site. On January 19, 1989, a site issue was designated for hearing against Biltmore. Not until March 20, 1989, did Biltmore seek leave to amend, which was denied by the ALJ for lack of diligence, *id.*, para. 13; *see also* FCC 89M-1084, April 5, 1989 (ALJ). The rejection of the amendment left the applicant without a required transmitter site.

6. Under Commission precedent, due diligence must be demonstrated for a post-designation amendment and is computed from the time an applicant knew, or should have known, about the problem requiring the amendment. *Brownfield Broadcasting.* The record supports the ALJ's finding that, six months before the case was designated for hearing, Biltmore Forest became aware of its site problem. An additional two months passed after a site issue was designated for hearing and before Biltmore Forest sought leave to amend to specify a new site. During that time, the applicant failed to report that significant change in its application as required by our rules, 47 CFR § 1.65; it also failed to amend within 30 days of the release of the designation order specifying the site issue. *But see Carol Sue Bowen*, 6 FCC Rcd 10, 12 n. 1 (Rev. Bd. 1991). Finally, some eight months after learning about the site problem, it sought leave to amend. Past precedent firmly supports the ALJ's holding that an eight-month delay in proposing a new transmitter site does not constitute due diligence. *See generally Mableton Broadcasting Co., Inc.*, 5 FCC 6314, 6326 n. 36 (Rev. Bd. 1990).

7. Biltmore's chances of prevailing in this case would not be significantly improved even if we had resolved the site availability issue in its favor. *See I.D.*, n. 33. It has claimed only a 15% integration factor, and it would also receive a decisionally significant diversification demerit because of its other media interests. *Id.*, paras. 72-76.

8. *Liberty.* The ALJ found that Liberty never had reasonable assurance that the site which it specified in its application was available, and that its principal falsely certified that the transmitter site was available because she "had absolutely no basis for doing so. Moreover, she knew she had no basis for so certifying." His findings (*I.D.*, paras. 36-51) and conclusions (*id.*, paras. 7-9) were based on the verified statements and deposition testimony of the site owner. Her testimony, in turn, was corroborated by the fact that other applicants who had sought permission to use her land were required to enter into written leases. *I.D.*, para. 40.

9. Liberty now argues that the ALJ should not have accepted the testimony of the site owner (Ms. Vicky Utter), and should have instead credited the more extensive and detailed testimony of its principal (Ms. Valerie Klemmer), which was purportedly supported by a disinterested witness (Tim Warren). Br. 7-20. Two competing applicants respond: "Even accepting Klemmer and Warren's descriptions of the conversation in which they assert there was a discussion about rent, it is clear that the discussion did not move beyond conversation of a mere possibility of a lease," Skyland Br. 17-18; and that "[e]ven the testimony of Liberty's witnesses demonstrates that 'reasonable assurance' of tower site was never achieved." Willsyr Reply, 5-7.

10. We agree that Liberty's own testimony supports the ALJ's finding that, prior to certification, there was "no meeting of the minds." "Reasonable assurance that a transmitter site is available requires more than a vague 'willingness to deal' on the part of the owner of the site." *Progressive Communications, Inc.*, 3 FCC Rcd 5758, 5759 (Rev. Bd. 1988); *Adlai Stevenson IV*, 5 FCC Rcd 1588 (Rev. Bd. 1990); *see generally also South Florida Broadcasting Co.*, 99 FCC 2d 840 (Rev. Bd. 1984) (owner had requested written option agreements).

11. The record establishes that, six days before its application was due, Liberty's witnesses visited the site owner. Liberty's principal told the owner that "she might be interested in leasing the site from her" and that they only discussed "the possibility of leasing the site from her." Tr. 652, 655, 811, 872. There was no discussion of how much land was needed, and no specific part of the property of less than two acres was identified as the location to be used for a tower site. Tr. 663, 811-814. Finally, the geographic coordinates of the site were provided not by the owner, but by a third party. Tr. 664-665, 901-902. The ALJ properly concluded that vague discussions with the site owner, and Liberty's hopes and expectations, do not support a finding that there was the requisite meeting of the minds required for reasonable assurance. "A mere possibility that a site will be available is not sufficient," *see supra* para. 3. Like the ALJ, we find no reason in the record to reject the firm denial of the site owner that she had ever given assurance to Liberty that the property would be available, especially where twice before she had insisted on written agreements. *See South Florida Broadcasting, supra.*

12. Since Liberty is not basically qualified because of its disqualification on the site issue, we need not reach the issue of whether it misrepresented to the Commission when it certified that a transmitter site was available, nor do we have to consider whether Liberty is entitled to any comparative credit because its application is allegedly a sham.

COMPARATIVE ISSUES

13. *Willsyr Communications.* Willsyr Communications was not awarded any quantitative integration credit by the ALJ because the totality of the circumstances undermined the credibility of the limited partnership agreement. *See, e.g., Doylan Forney*, 5 FCC Rcd 5423, 5427 (1990); *Metroplex Communications, Inc.*, 5 FCC Rcd 5610 (1990); *Royce International Broadcasting*, 5 FCC Rcd 7063 (1990). In essence, the ALJ held that William Eaton, an existing broadcaster and purported limited partner, dominated the partnership from the outset; he selected one of his present employees, Sharan Harrison, casting her in the role of the general partner, knowing that he could continue to dominate the partnership since she had no funds of her own.

14. The following factual circumstances support the ALJ's reasoning:

(a) Eaton initiated the application, controlled its filing and prosecution through continuing consultation with counsel. Tr. 1387, 1479, 1499, 1505-1509.

(b) Eaton countersigned counsel's retainer letter and personally guaranteed any legal bill incurred by Harrison. Tr. 1135; Rakel Exh. 17. Tr. 1508-1510.

(c) Eaton did not inform Harrison that he had asked the Commission to withdraw the Biltmore Forest FM allotment and reassign it so that he could use it to upgrade his existing Greenwood station. Rakel Ex. 14, Tr. 1447-1449; 1454-1455.

(d) Eaton obtained a commitment letter from a bank without any reference to Harrison, and helped Harrison open a bank account for the partnership, and all principals signed the authorization card. *I.D.*, paras. 135, 138.

(e) Eaton and his family have provided all prosecution expenses, Tr. 1180, 1312-1313; Eaton unilaterally established the terms of several loans to Harrison (Tr. 1179-1180); Harrison never discussed any of the terms, nor has there been any discussion about how she will repay these loans. Tr. 1180, 1193, 1312-1313.

Several other findings support the ALJ's conclusion that Eaton has continued to exercise dominance over the financial affairs of the partnership after the application was filed:

(f) Although Ms. Harrison purports to be Willsyr's sole general partner, when it comes to finances she simply follows the limited partner's directions. For example, she executed an $8,000 promissory note on behalf of the partnership in January, 1989, on a loan for Lee Eaton. Lee Eaton had drafted the promissory note and sent it to Ms. Harrison along with a loan check. Ms. Harrison has no idea why the partnership is obligated to pay "on demand" rather than at a specified time as her own August 1987 notes provide. Tr. 1321-1322. *I.D.*, para. 134.

(g) As general partner, it is Ms. Harrison's duty to pay the partnership bills. When she needs funds, she advices Eaton, and he arranges to obtain funds by contacting his brother. Tr. 1495-1496. *I.D.*, para. 136. Ms. Harrison has had no input as to the terms under which additional funds are made available, and is therefore at the mercy of the limited partners. Tr. 1180, 1183, 1185-1186, 1332, 1345-1346, 1431.

The last two findings, standing alone, are decisionally significant because the Commission has held that "where a passive owner is shown to be materially involved in the applicant's activities after that owner has been held out as a passive investor, that owner's interest will be considered for comparative purposes." *Coast TV*, 5 FCC Rcd 2751, 2652 (1990). If the interests of the other owners are considered, as *Coast* requires, Willsyr's integration credit would be reduced to 20%. Willsyr would also receive a decisionally significant diversification demerit because of the other broadcast interests of the Eaton family. *See I.D.*, paras. 69-70. Thus, under either *Coast* or the "totality of the circumstances" test, Willsyr could not qualify as a viable comparative applicant. *Royce International, supra.*

15. *National Communications.* National Communications was awarded only 50% quantitative credit by the ALJ because its competitors were able to establish at the hearing that Anita Hunter, a 97% stockholder, and her husband, William, purportedly a 3% stockholder, who was not proposing to be integrated, are in fact 50% joint owners. *Id.*, paras. 97-98. We affirm the ALJ's conclusion, which is supported by a substantial factual record and ample precedent. *See, e.g., Marlin Broadcasting of Central Florida*, 4 FCC Rcd 7945, 7949 (Rev. Bd. 1989) (subsequent history omitted). In fact, credit could have been reduced to 0% (as the ALJ noted, *see I.D.*, n. 20), because of the sham nature of Hunter's legal proposal. *N. E. O. Broadcasting Co.*, 103 FCC 2d 1031 (Rev. Bd. 1986); *Royce International, supra.*

16. Briefly summarized, compelling record evidence, which is fully chronicled in the *I.D.*, paras. 98-105, and its competitors' pleadings, reveals that the Hunters' own testimony establishes that the husband constructively held a 50% ownership interest. He has solid broadcast experience; she has none. He was the prime mover and heavily involved in the application process, and candidly admitted that the putative 97%-3% structure was designed to take advantage of Congressional and Commission decreed policies. The husband indicated that the money for the proposal "came from both of us," *id.*, at 100; his wife indicated that the station would be run jointly and that he was entitled to half the profits, even *after* their divorce became final. *Id.*, Find. 99. This gamesmanship will not be rewarded. *See, Richard Bott, II*, 4 FCC Rcd 4924 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2508 (1990), *aff'd sub nom Radio Representatives Inc. v. FCC*, No. 90-1227 (D.C. Cir. Feb. 22, 1991).

17. *Skyland.* Skyland received only a 76% quantitative integration credit, because three non-voting stockholders, members of a local law firm which represents Skyland, were not sufficiently insulated from its operation to be considered passive investors. *I. D.*, Find. 154. A solid line of Commission precedent supports the ALJ's holding on this point. In *Coast, supra*, 5 FCC Rcd at 2753, the Commission held that "where an owner has assumed an active role after the applicant has declared that the owner will be passive, that owner's equity interest will be attributed to the applicant for integration purposes regardless of the nature of the 'passive' owner's involvement." *See also Mark Wodlinger*, 3 FCC Rcd 3139 (Rev. Bd. 1986), where a commercial law attorney who had merely prepared a partnership agreement was held an active principal for

integration purposes; *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948 (Rev. Bd. 1988), *review denied*, 5 FCC Rcd 5561 (1990) (integration credit reduced because non-voting shareholder had provided significant legal services to the applicant, including drafting of all of its corporate documents).

18. Here, the senior partner in the local law firm "was the prime mover behind Skyland's application. It was his idea . . . he took the lead in contacting others who might be interested . . . ." *I.D.* at para. 159 The law firm even advanced Skyland's FCC and corporate filing fees and expenses. *Id.*, para. 158. After Skyland had declared its "active/passive" ownership structure, the law firm continued to play an active role in the corporation's affairs. *Id.*, para. 157. It was local counsel (Watts), a nominally passive owner, who rejected the advice of communications counsel, and included in the corporation's bylaws a provision that the passive owners could continue to serve as Skyland's corporate lawyers. Tr. 2330-2332. Watts testifed that:

> wording that had been suggested by FCC counsel would have been a blanket prohibition; and both Wanda [Skyland's general manager] and I knew that I had already been providing legal services to Skyland Broadcasting up to that point, and to put a blanket prohibition in there simply was not going to reflect the realities of what had already transpired.

Skyland now argues, Br. 10-11, that the professional services provided by local counsel are not related to its media enterprise. But Skyland *has* no other enterprise nor has it suggested any. With justifiable irony, Harbinger responds (Reply, 24-25) that Skyland should have heeded the sound advice of communications counsel and fully insulated its "passive" owner lawyers. We affirm the ALJ's reduction of Skyland's credit, which is supported by the totality of the factual record and controlling Commission precedent. *See, e.g., Doylan Forney, supra*, 3 FCC Rcd at 6332, *aff'd* , 5 FCC Rcd at 5424-5425.

QUALITATIVE ANALYSIS

19. Only Orion and Harbinger were awarded 100% quantitative integration credit. *I.D.*, para. 223. Ultimately, the ALJ held that the traditional qualitative enhancement factors favored Orion for the following reasons (*I.D., Concls*, paras. 29-30):

> Minority participation and local residence are of equal importance. *See Radio Jonesboro, Inc.*, 100 FCC 2d 941, 945-946 (1985). Orion's 100% credit for long term residence clearly prevails over Harbinger's 33% for local residence and 33% for minority participation (total -66%). Nor is that advantage offset by Harbinger's 67% to 30% advantage on female participation since female participation is of less importance than minority participation or local residence. *See Mid-Florida Television Corporation*, 69 FCC 2d 607, 652 (Rev. Bd. 1987); *Radio Jonesboro, Inc., supra.*
>
> . . . Then we must add in Orion's 100% to 33% advantage on civic participation, and its powerful and substantial 100% to 33% advantage on past broadcast experience. Harbinger's very slight preference over Orion for comparative coverage does little to offset Orion's large comparative integration advantage. Orion is declared the winner.

20. Harbinger, joined by Orion's other competitors, contends, initially, that Orion is entitled to only 70% quantitative integration credit, because one of Orion's principals, Betty W. Lee, a 30% shareholder, would be unlikely to exercise management-level responsibilities at the proposed station, Br. 7-14. She proposes to work full-time as the station's Director of Public Affairs and Public Service, a position which in past cases, has received full credit. *See, e.g., Bay Television, Inc.*, 95 FCC 2d 181, 188 (Rev. Bd. 1983) (director of community relations); *Merrimack Valley Broadcasting, Inc.*, 92 FCC 2d 506, 511 (Rev. Bd. 1982) (community affairs director). *See also Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 395 (1985). Harbinger argues, however, that Lee's present duties at Station WSKY (AM) are primarily clerical, that she is currently not reported to the Commission as a managerial employee, and that her husband, Zebulon Lee, testified that Orion's proposed station will be operated "the same way" he now operates Station WSKY. According to Harbinger, this "simply confirms the common sense proposition that the way Zebulon Lee has run his family-operated AM station these many years would be the way he would run the family-operated FM station if awarded the permit." Br. at 12. In essence, Harbinger argues that "Orion . . . failed to show [Betty Lee] would be likely to fill a management level policy-making position." Br. at 14.

21. Orion responds to the charge that her proposed duties will be clerical by adverting to her written testimony (detailed in para. 184 of the *I.D.*) describing the functions she will perform at the proposed station, including her new duties (Orion Ex. 2, para. 4) that were contrasted with her present duties at the AM station (*Id.*, paras. 8-9). With respect to Harbinger's purported reliance on Zebulon Lee's testimony that the new station operation (and presumably Ms. Lee's duties) would remain the same as that at Station WSKY, Orion asserts that Harbinger's argument is flawed, because "Zebulon Lee never said that Betty Lee's duties at Orion's FM station will be the same as her duties at WSKY." Reply, 6-7. His testimony was as follows (Tr. 2346):

> "'Do you feel that the way you've operated WSKY is a successful way of operating, and you would propose to operate the FM the same way?' I did answer 'Yes.' I would do it basically like that, but there's no two stations that could be run exactly alike."

22. In awarding full credit for Ms. Lee's participation, the ALJ correctly reasoned (*id.*, paras. 192-193):

> It doesn't follow that because Betty Lee wasn't listed as an official or manager at WSKY that she can't handle the position of Director of Public Affairs and Public Service at the *proposed* station (see Finding 185 *supra).*
>
> The record establishes that at WSKY some of Betty Lee's duties have been clearly clerical, but some are managerial. Some of her duties are in the sales category, some involve on-air work. She has scheduled interviews for station promotional efforts; she

has interviewed guests on the air; and she handles correspondence and writes advertising copy. She has worked collections, sold advertising, managed WSKY's public affairs and public relations, and had charge of the stations promotions (Tr. 2347-2350).

23. Moreover, neither Ms. Lee nor her husband was questioned about her proposed position, nothwithstanding that her direct testimony had been reduced to written form prior to hearing. *See* Orion Ex. 2. We heed the court's admonition in *Office of Communications of United Church of Christ v. FCC*, 425 F.2d 543, 549 (D.C. Cir. 1969), that evidence which is "not contradicted . . . or on its face incredible . . . [is] entitled to carry the day in terms of establishing the point to which it was directed." The record evidence supports the ALJ's award of 100% quantitative credit to Orion.

24. Harbinger also claims it is the preferred applicant on the qualitative enhancements. First, it argues that Orion is not entitled to credit for civic activities because those activities were both "distant in time" and work-related, *i.e.*, undertaken as an adjunct to the operation of Station WSKY, Asheville, North Carolina, which activities, Harbinger asserts, are not entitled to credit, relying on *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 185 (Rev. Bd. 1986). Those arguments are without merit. With respect to the claim the activities were distant in time, we note that Orion's civic activities were related to the *continuing* operation of a broadcast station within the service area of the proposed station since 1946. The ALJ's findings, *I.D.*, paras. 177-179, 188, 199, establish that these activities were not so limited or remote they should receive no credit. As for Harbinger's work-related contention, the Board rejected a similar argument in *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7273 (Rev. Bd. 1990). There, we noted that the *Policy Statement* provides that "any local activities indicating a knowledge and interest in the welfare of the community [are] entitled to an enhancement credit"; *see also Newton Television Ltd.*, 3 FCC Rcd 553, 555 (Rev. Bd. 1988) (rejecting claim that principal not entitled to enhancement for activities ancillary to their church work).

25. Here, Orion's activities (*I.D.*, paras. 177-179, 188, 199) demonstrate both knowledge of, and interest in, serving the needs of the service area. That is sufficient. *Jarad Broadcasting Co., Inc.*, 1 FCC 2d 181, 1985 (Rev. Bd. 1986) (subsequent affirmances omitted), relied upon in the exceptions, did not hold otherwise. There, the Board held merely that *that* principal's occupational pursuits were not "civic activities" within the ordinary purport of the 1965 *Policy Statement*. To the extent that the exceptions have overinterpreted *Jarad*, we have in the past and will in the future, credit local activities that evince civic participation in the affairs of the service area, even though work-related. *Newton Television Limited, supra*, 3 FCC Rcd at 555. Any suggestion otherwise in *Jarad* is hereby clarified to remove any lingering misimpression.

26. Next, Harbinger argues that the ALJ improperly evaluated Orion's credit for broadcast experience by labelling it "a powerful and substantial advantage." Br. at 18-21. However the ALJ characterized this enhancing attribute, the percentage of qualitative enhancements awarded an applicant is still proportionate to the quantitative ownership of the integrated principal, *see Debra D. Carrigan*, 104 FCC 2d 826, 833 (1966) (subsequent history omitted); and here, the ALJ properly found that Orion had a 100% versus 33% superiority over Harbinger, which is entitled to a preference. When the qualitative enhancements of both applicants are totalled, the ALJ's holding was proper that Orion's uncontested 100% local residence, standing alone, is sufficient to outweigh Harbinger's 33% local residence, 33% minority ownership, and 37% superiority on female ownership, since local residence is equal to minority ownership and superior to female ownership. *Radio Jonesboro, Inc., supra.* Orion, however, was entitled to additional enhancement credit for civic activities and broadcast experience, leaving it as the obvious superior applicant on the integration criterion.

27. Harbinger's final contention is that it prevails comparatively over Orion in any event because of its superior comparative coverage. The undisputed findings establish that Orion proposes to serve 184,250 persons, and Harbinger would serve 215,037. *I.D.*, para. 91. Although Harbinger argues that the ALJ erred in his analysis of comparative coverage by awarding it only a "very slight" preference, its argument ignores the decisional finding, *id.*, para. 91, that the additional 30,787 persons who will receive new service from Harbinger "presently receive five or more aural services, so none of the applicants will provide service to any underserved areas." The ALJ's award is supported by Commission precedent. *See Barton Broadcasting Co.*, 104 FCC 2d 785, 790-91 (Rev. Bd. 1986) (subsequent history omitted) (45,000 population advantage only warrants "very slight" preference where area is already well-served). Orion's slight overall integration preference is sufficient to prevail over the very slight comparative coverage awarded to Harbinger. *See generally Northern Sun Corp.*, 100 FCC 2d 889, 895 (Rev. Bd. 1985), *review denied*, FCC 86-135, released March 28, 1986. We need not reach the exceptions that Harbinger is entitled, at most, to 33% quantitative integration credit. These are non-decisional.

28. ACCORDINGLY, IT IS ORDERED, That the application of Orion Communications Limited (File No. BPH-870901ME) IS GRANTED; and that the applications of National Communications Industries (File No. BPH-870831MF), Liberty Productions, a Limited Partnership (File No. BPH-870831MI), Willsyr Communications Limited Partnership (File No. BPH-870831MJ), Biltmore Forest Broadcasting FM, Inc. (File No. BPH-870831MK), Skyland Broadcasting Company (File No. BPH-870831ML), and Harbinger Broadcasting Company, (File No. BPH-870901MF), ARE DENIED.

29. IT IS FURTHER ORDERED, That the motions to correct the transcript, filed on October 29, 1990 by Harbinger Broadcasting Company, and on November 1, 1990 by Orion Communications Limited, ARE GRANTED; and that Skyland Broadcasting Company's Motion to Accept Supplement, filed October 23, 1990, its Motion to Accept Further Supplement, filed December 11, 1990, and, its Motion to Accept Third Supplement, filed February 25, 1991, ARE DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

RKO GENERAL, INC. (KFRC) San Francisco, California	**MM Docket No. 84-1098** File No. BR-43

For Renewal of License

GOLD COAST BROADCASTING, INC. San Francisco, California	**MM Docket No. 84-1099** File No. BP-800930AL
PAUL J. GROWALD San Franciso, California	**MM Docket No. 84-1100** File No. BP-830509AE
SOUTH JERSEY RADIO, INC. Richmond, California	**MM Docket No. 84-1101** File No. BP-830511AG
GOLD MOUNTAIN BROADCASTING CO. San Francisco, California	**MM Docket No. 84-1110** File No. BP-830512BX
COZZIN COMMUNICATIONS Richmond, California	**MM Docket No. 84-1111** File No. BP-830512BQ

For Construction Permit for a New AM Station

ORDER

Adopted: March 20, 1991; Released: March 21, 1991

By the Review Board: MARINO (Chairman) and BLUMENTHAL. Board Member ESBENSEN absent.

1. By *Memorandum Opinion and Order*, FCC 91-82, adopted March 15, 1991, the Commission approved a settlement in this proceeding providing for (a) dismissal with prejudice of the license renewal application of RKO General, Inc., for station KFRC and dismissal of the mutually exclusive applications of Gold Coast Broadcasting, Inc., Paul J. Growald, and Gold Mountain Broadcasting Co.; (b) grant of the mutually exclusive application of South Jersey Radio, Inc. for KFRC; and (c) grant of assignment of license for station KFRC to Bedford Broadcasting Company. The Commission terminated the proceeding and directed the Review Board to terminate the proceedings before it relating to the comparative qualifications of the various applicants.

2. ACCORDINGLY, IT IS ORDERED, That the pending exceptions and related pleadings before the Review Board to the partial initial decision in this proceeding, *RKO General, Inc. (KFRC)*, FCC 86D-49, released August 8, 1986 ARE HEREBY DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC.	File No. BPH-870612MC
HERBERT REGENSTREIF	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD.	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC.	File No. BPH-870615MV

For Construction Permit for New
FM Station, Midway, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: March 21, 1991; Released: April 8, 1991

By the Review Board: MARINO (Chairman), and BLUMENTHAL. Board Member ESBENSEN absent.

1. On February 21, 1991, Herbert Regenstreif (Regenstreif) petitioned for reconsideration of the Board's *Memorandum Opinion and Order*, FCC 91R-8, released February 12, 1991. There, the Board denied Regenstreif's October 1, 1990 appeal of the Administrative Law Judge's *Order*, FCC 90M-2868, released September 12, 1990, which terminated this proceeding and granted a universal settlement pursuant to which Regenstreif was obligated to pay to Midway Communications, Ltd. (Midway) $15,000 for the dismissal of Midway's application. Regenstreif, who along with Belhouse & Associates, Inc., received the construction permit in this proceeding, once again protests the requirement that he has to pay Midway the $15,000, and, for the reason explained below, we again affirm this requirement.

2. The central issue continues to be whether Midway's "Exceptions," which contested the ALJ's original ruling that Regenstreif did not have to pay the $15,000 to Midway, were in fact filed by February 20, 1990. In our February 12, 1991 *Memorandum Opinion and Order*, we concluded that Midway's pleading was filed on February 1, 1990. This timely filing triggered the Board's jurisdiction which had previously led to a remand to the ALJ and his ultimate approval of the disputed $15,000 payment to Midway. *See Memorandum Opinion and Order*, 5 FCC Rcd 3694 (Rev. Bd. 1990). In its instant petition for reconsideration, Regenstreif advances three arguments. First, he asserts that the Board failed to address the "unique pattern" of questionable filings by Midway's counsel involving the previously mentioned exceptions, and Midway's claim that it filed a Notice of Appearance on or about December 20, 1989. Second, Regenstreif contends that it is inherently unbelievable that Midway's exceptions were filed on February 1, 1990, since no other applicant received a copy and there is no copy on file with the Commission. Lastly, Regenstreif complains that Midway's improper filing deprived it of an opportuntity to show why the equitable principles of *St. Croix Wireless Co.*, 3 FCC Rcd 4073 (1988), were inapplicable to Midway.

3. Regenstreif's first two arguments were indeed considered earlier by the Board. Specifically, we addressed the notice of appearance in our June 19, 1990 remand order (*Memorandum Opinion and Order*, 5 FCC Rcd 3694 (1990)), and the circumstances underlying the misfiled Exceptions in our February 12, 1991 *Memorandum Opinion and Order*. Reconsideration will not be granted merely for the purpose of rehashing arguments previously made and considered. *WWIZ, Inc.*, 37 FCC 685, 686 (1964)(subsequent history omitted).

4. As for Regenstreif's last argument, we are unpersuaded that *St. Croix Wireless Co., supra*, is inapplicable to the instant case. St. Croix relaxed the requirement that an applicant file a notice of appearance if it is to participate in a universal settlement agreement, based on equitable considerations. Specifically, the Commission held that a notice of appearance could be filed late if the settlement involved all the applicants, would terminate the proceeding, and prejudice no other party or the public. 3 FCC Rcd at 4074. The first two requirements are met here by allowing Midway to file a late notice of appearance. While Regenstreif claims that he has been prejudiced because he has already paid the $15,000 earmarked for Midway to charity, we do not consider such an independent and voluntary act to constitute prejudice of the type proscribed by St. Croix.

5. Accordingly, the Petition for Reconsideration, filed February 21, 1991 by Herbert Regenstreif, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of the Aviation Services Rules (Part 87) to provide additional air-to-air frequencies for use in and around the Grand Canyon area.

ORDER

Adopted: March 25, 1991; Released: April 10, 1991

By the Commission:

I. INTRODUCTION

1. This Order amends Part 87 of the Rules (Aviation Services) to replace one of three frequencies allocated for use in the vicinity of the Grand Canyon for air-to-air communications and to add a new air-to-air frequency for flights between the Grand Canyon and Las Vegas.

II. BACKGROUND

2. On May 9, 1989, in response to a request by the Federal Aviation Administration (FAA), the Commission adopted an *Order*, 4 FCC Rcd 4110 (1989), to permit air-to-air communications between all types of aircraft on VHF frequencies 121.950 MHz, 122.750 MHz and 122.850 MHz in the vicinity of the Grand Canyon National Park in Arizona. This action was taken to improve air safety communications capability in the Grand Canyon vicinity. Because of congestion caused by high altitude traffic on 122.750 MHz, the FAA requested additional changes to frequency assignments in the Grand Canyon vicinity to further improve air flight safety.[1] To relieve the problem, the FAA, on a trial basis, authorized the use of two frequencies from its pool of air traffic control freqencies, 120.650 MHz and 127.050 MHz, for use in the Grand Canyon area. These frequencies have proven to be of great value in enhancing air safety.

III. DECISION

3. We concur with the FAA that amending the Commission's Rules to replace the frequency 122.750 MHz with 127.050 MHz for use as an air-to-air frequency in the Grand Canyon Park and to assign exclusive use of 120.650 MHz as an air-to-air frequency in the corridor between the Grand Canyon and Las Vegas will enhance safety by providing improved air-to-air communications. These frequencies have been in use in the area since March, 1990. No adverse comments concerning the use of these frequencies have been received by the Commission or by the FAA. Due to the remoteness of the region, no other potential user should be affected by these changes. For these reasons, we are amending the rules to implement the use of these frequencies as requested by the FAA in the Grand Canyon area.

IV. PROCEDURAL MATTERS

4. This amendment has been analyzed with respect to the Paperwork Reduction Act of 1980, 44 U.S.C. §§ 3501-3520 and found to impose no new or modified form, information collection and/or record keeping, labeling, disclosure, or retention requirements, and will not increase or decrease burden hours imposed on the public.

5. This rule amendment provides for the replacement of one of three air-to-air frequencies in the Grand Canyon area and the addition of a new air-to-air frequency for a VFR flight corridor between the Grand Canyon and Las Vegas. The frequencies have been in continuous use since March, 1990, and come from the FAA's pool of air traffic control frequencies. No complaints or adverse comments have been received concerning this use. This change is non-controversial and therefore constitutes a minor amendment to the rules in which the public is not likely to be interested. Therefore, we find for good cause that compliance with the notice and comment procedure of the Administrative Procedure Act is unnecessary. *See* 5 U.S.C. § 553(b)(3)(B). In addition, because this amendment will promote increased safety in the aviation service, we find good cause to amend the rules effective immediately. Therefore, this rule amendment will be effective upon publication in the Federal Register. *See* 5 U.S.C. § 553(d).

V. ORDERING CLAUSES

6. Accordingly, IT IS ORDERED that, under the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r), Part 87 of the Commission's Rules IS AMENDED as set forth in the Appendix below, effective upon publication in the Federal Register.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 87 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

Part 87 - AVIATION SERVICES

1. The authority citation for Part 87 continues to read as follows:

Authority: 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-156, 301-609.

2. In Section 87.187, paragraph (z) is revised and a new paragraph (aa) is added to read as follows:

§ 87.187 Frequencies

* * * * *

(z) The frequencies 121.950 MHz, 122.850 MHz, and 127.050[1] MHz are authorized for air-to-air use for aircraft up to and including 10,000 feet mean sea level in the vicinity of Grand Canyon National Park in Arizona within the area bounded by the following coordinates:

36-28-00 N. LAT; 112-47-00 W. LONG.
36-28-00 N. LAT; 112-48-00 W. LONG.
35-50-00 N. LAT; 112-48-00 W. LONG.
35-43-00 N. LAT; 112-47-00 W. LONG.

(aa) The frequency 120.650[1] MHz is authorized for air-to-air use for aircraft up to and including 10,000 feet mean sea level within the area bounded by the following coordinates:

35-59-45 N. LAT; 114-51-45 W. LONG.
36-09-30 N. LAT; 114-50-00 W. LONG.
36-09-30 N. LAT; 114-02-55 W. LONG.
35-54-45 N. LAT; 113-48-45 W. LONG.
35-54-45 N. LAT; 114-41-45 W. LONG.

[1] Until further notice this frequency is available for air-to-air use as described in the Grand Canyon vicinity. Availability is a result of the FAA's assignment of this frequency. If the FAA reassigns this frequency the Commission may require air-to-air use to cease.

FOOTNOTE

[1] *See* Letter to Robert E. Mickley, Chief, Aviation and Marine Branch, Special Services Division, FCC from Gerald J. Markey, Chief, Spectrum Engineering Division, FAA, (October 2, 1989). *See* also Memorandum on air-to-air frequencies from Gerald J. Markey to, among others, George R. Dillon, Chief, Aviation and Marine Branch, Special Services Division, FCC (March 13, 1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
WDAX, Incorporated
Licensee of Radio Stations
WDAX AM-FM, McRae, Georgia

for a forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1991; Released: April 11, 1991

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief of the Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules (47 C.F.R. Section 0.283), has under consideration a $2,000 Notice of Apparent Liability (NAL), issued April 27, 1988, to WDAX, Incorporated, licensee of radio stations WDAX AM-FM ("WDAX"). No response to the NAL was received[1].

2. The forfeiture was assessed for apparent violations of Section 317(a) of the Communications Act of 1934, as amended,[2] and Section 73.1212(a) of the Commission's Rules,[3] for repeated failure to identify the sponsor of an advertisement regarding a referendum on the establishment of a hazardous waste management facility within Telfair County, Georgia. Although the advertisement was identified as being a "paid announcement," neither the name of the local citizen who paid for the announcement, nor the organization on whose behalf the advertisement was aired, was revealed by the station.

3. In WDAX's letter of December 28, 1987, responding to the Commission's letter of inquiry of December 11, 1987, WDAX admitted that the advertisement aired 26 times on November 17, 1987, identified only as a "paid announcement." WDAX stated that, since the commercials were not considered political in nature, it believed the accompanying statement was sufficient to meet the requirements of the Commission's Rules, and that any violation of the Rules was unintentional.

DISCUSSION AND FINDINGS

4. Section 73.1212(a) of the Commission's Rules requires a broadcaster, when airing any matter for which valuable consideration has been paid or promised, to reveal not only the fact that the announcement was paid for but also by whom or on whose behalf the announcement aired[4]. WDAX's failure to reveal either who paid for the announcement or on whose behalf the announcement was paid was in violation of this requirement.

5. The Communications Act authorizes the Commission to levy forfeitures when its rules are either willfully or repeatedly violated[5] It is, therefore, of no consequence that WDAX's violation of the Rule was unintentional. Since the announcement was aired 26 times, it constitutes a repeated violation of the Commission's Rules.

6. In view of the above, and pursuant to Section 503(b) of the Communications Act of 1934, as amended, IT IS ORDERED that WDAX AM-FM FORFEIT to the United States the sum of eighteen hundred dollars ($1,800) for its repeated violation of the sponsorship requirements of Section 317(a) of the Communications Act (47 U.S.C. Section 317(a)) and Section 73.1212(a) of the Commission's Rules (47 C.F.R. Section 73.1212).

7. In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules and Section 504(b) of the Communications Act, as amended, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTES

[1] A payment schedule was submitted to the licensee on September 15, 1989, consisting of 20 installments at $100 per payment, due on the first of each month, starting on November 1, 1989. The licensee made two payments, on November 3, 1989 and April 17, 1990, for a total of $200. No payment has been received since April 1990, on the remaining balance of $1800.

[2] Section 317(a)(1) of the Communications Act provides, in part:

> (a)(1) All matter broadcast by any radio station for which any money, service or other valuable consideration is directly or indirectly paid, or promised to or charged or accepted by, the station so broadcasting, from any person, shall, at the time the same is so broadcast, be announced as paid for or furnished, as the case may be, by such person . . .

[3] Section 73.1212(a) of the Commission's Rules provides, in part:

> (a) When a broadcast station transmits any matter for which money, service, or other valuable consideration is either directly or indirectly paid or promised to, or charged or accepted by such station, the station, at the time of the broadcast, shall announce: (1) that such matter is sponsored, paid for, or furnished, either in whole or in part, *and (2) by whom or on whose behalf such consideration was supplied* . . . [emphasis added].

[4] *Id.* .

[5] Section 503(b) of the Communications Act states, in part:

> (b) Any person who is determined by the Commission, in accordance with paragraph (3) or (4) of this subsection, to have---

> . . . . (B) willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act . . .
>
> . . . .

shall be liable to the United States for a forfeiture penalty.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN Docket No. 87-552

In the Matter of

Amendment of Parts 2, 73, 74,
and 78 of the Commission's
Rules to relax the equipment
authorization procedures

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 25, 1991; Released: April 11, 1991

By the Commission:

INTRODUCTION

1. On December 1, 1987, the Commission adopted a *Notice of Proposed Rule Making* (*Notice*) proposing to relax equipment authorization requirements for most categories of equipment used by licensees in the broadcast and cable television relay services.[1] By this action, the Commission declines to adopt the changes proposed in the *Notice*.

BACKGROUND

2. The Commission's equipment authorization procedures are intended to ensure that radio frequency devices are compliant with the FCC's technical standards. As set forth in Subpart J of Part 2 of the regulations, there are five equipment authorization procedures for radio frequency devices: type approval, type acceptance, certification, notification and verification.[2] Under type approval, the Commission, through its laboratory facility, examines and tests equipment submitted by the applicant in making the determination whether to grant an authorization. Under certification and type acceptance, the Commission reviews measurement data and other information submitted by the applicant in making its decision on issuance of a grant. Under notification, the applicant is required to submit an abbreviated application that includes a statement attesting that the equipment has been tested and found to comply with the appropriate regulations. [3] The Commission then issues a grant of authorization. Under the remaining form of authorization, verification, no documentation is filed with the Commission and no grant of authorization is issued. Instead, the manufacturer, importer or other party responsible for the marketing of verified equipment within the United States is required to have the equipment tested and to retain measurement and other data demonstrating compliance with the rules.[4] The party responsible for marketing radio frequency equipment that is subject to the FCC's authorization procedures must obtain a grant of authorization or have the equipment verified prior to marketing it in the United States.[5]

3. In 1984, the Commission relaxed the equipment authorization requirements for certain categories of broadcast and cable television relay equipment from type acceptance to notification.[6] The *Notice* in the current proceeding proposed to consider: 1) whether the equipment authorization requirements for broadcast and cable television relay equipment subject to notification should be relaxed further to verification,[7] and 2) whether the authorization requirements for additional categories of broadcast and cable television relay service equipment governed by Parts 73, 74, and 78 should be relaxed from type acceptance to notification or verification.[8] This proposal was part of the Commission's ongoing efforts to eliminate unnecessary and burdensome regulatory requirements.

4. In making these proposals, the Commission observed that broadcast and cable television services generally employ equipment of well-established and proven design. It indicated that this type of equipment is used in limited quantities (compared to consumer equipment) and has had a satisfactory record of compliance with the technical standards. Further, the Commission pointed out that licensees of broadcast and cable television relay stations are required to maintain transmitting equipment within the performance parameters specified in the rules and to eliminate or reduce any interference caused to other licensed users of the spectrum. In light of these factors, the Commission tentatively concluded that the equipment authorization requirements could be relaxed without creating undue risk of interference, thereby reducing the regulatory burdens on broadcast and cable radio equipment manufacturers.

SUMMARY OF COMMENTS

5. Eight parties filed comments and two filed replies in this proceeding.[9] The NAB opposes further relaxation of the authorization requirements for broadcast and cable television relay equipment. It is concerned that the relaxation of equipment authorization requirements could result in a decrease in the compliance of equipment with the FCC's technical requirements. As non-compliant equipment could cause widespread interference, NAB requests that the Commission, prior to taking further action in this proceeding, examine data to demonstrate whether there was a change in compliance for other broadcast and broadcast related equipment that was previously placed under the notification procedures.

6. CBA is opposed to the proposed relaxation of the equipment authorization requirements for LPTV (low power TV) and TV translators. CBA states that the design of LPTV and TV translator equipment is not as mature as the design of full power broadcast equipment due to the continuing development of this industry, and should, therefore, be monitored more closely.

7. Harris, ITS, MAC, and SBE support the proposed relaxation of the authorization procedures for the reasons indicated by the Commission in the *Notice*. MAC points out that much of the video microwave equipment used by broadcast and cable television services is also designed for use by other services under Parts 21, 90 and 94 of the Commission's Rules. Since such equipment would still be subject to the stricter authorization procedures under the

other rules sections, MAC states that the proposed relaxation would have no practical effect. MAC requests that the Commission extend the proposed relaxation to the equipment used in other services under Parts 21, 90 and 94.

8. API and SIRSA state that they are opposed to any relaxation of the procedures for equipment that can be marketed for use in other services in addition to the broadcast and cable television services. They are concerned that manufacturers may design and market equipment that does not comply with the FCC's technical requirements under the less strict procedures and then market the equipment to Part 90 users, thereby increasing the potential for interference to land mobile communications systems. SIRSA states that equipment that does not meet the FCC's technical requirements poses a greater interference threat when used for Part 90 land mobile operations, than for licensed broadcasting operations, due to the large variety and number of transmitters operated in the land mobile services. SIRSA further states that land mobile transmitter operators are, for the most part, non-technical personnel with other areas of expertise, such as construction superintendents, farmers, and coal mine managers. API and SIRSA, in reply comments, oppose MAC's proposal that the proposed relaxation of the authorization procedures be extended to other services operating under Parts 21, 90 and 94.

DISCUSSION

9. The *Notice* indicated that the Commission had not found an increase in non-compliance after relaxing the equipment authorization requirements for broadcast and broadcast related equipment. This determination was based on a lack of interference complaints or station violations that could be tied to non-compliance with equipment authorization requirements. However, in response to NAB's comments, we examined forty-one test reports for Part 73 AM, FM, and TV transmitters that were authorized under the notification program. Most reports did not include adequate information on how the equipment had been tested. Some reports included measurement results for certain critical parameters, such as output power and bandwidth, but did not contain measurement results for other parameters necessary to determine compliance with our rules, such as frequency stability or chassis radiation. The FCC Laboratory also tested two low power TV transmitters and three TV translators. Four of the five transmitters complied with the technical requirements; however, one of these four required replacement of a defective output transistor before meeting the spurious emissions limit." One FM translator was also tested and found compliant.[10]

10. Based on this review and the statements of the commenting parties, we are concerned that any additional relaxation for equipment already in the notification category could lead to further degradation of testing documentation, and ultimately, to a decline in testing efforts and technical compliance. Such non-compliance could pose a severe risk of harmful interference in view of the high power typical of broadcast transmissions. We also observe that the existing notification requirement represents a minimal burden on manufacturers. In light of these factors, we conclude that a further relaxation of the authorization requirement for broadcast and cable television relay equipment already subject to notification is unwarranted at this time.[11]

11. We wish to take this opportunity to make manufacturers aware that in adopting the notification form of equipment authorization, the Commission discontinued the requirement that detailed measurement data be submitted with the equipment authorization application.[12] This action did not, however, relax the requirement for applicants to make all necessary tests to insure that the equipment complies with the applicable rules. Notification applicants are expected to perform all the same tests required for type acceptance and document the test results and measurement methods in their records.[13]

12. We also have carefully considered the arguments expressed by API and SIRSA that our proposal to expand the relaxation of authorization requirements to additional categories of broadcast and cable television relay equipment could lead to a potential increase in interference for land mobile services. We were aware when we adopted the *Notice* that broadcasters and land mobile stations occasionally used similar equipment. However, during the course of this proceeding, the extent of this practice became clear. If we were to adopt the relaxation of equipment authorization procedures as proposed, it could lead to confusion in the market as to the type of authorization required for a given equipment. In addition, CBA's concern about the state of development of LPTV and TV translators may be well-placed in light of our recent measurement experience. In view of these factors, we conclude that the proposed expansion of the relaxed authorization requirements to additional categories of broadcast and cable relay equipment is not in the public interest, at least at the present time.

13. In light of the above-mentioned concerns and considerations, we are withdrawing without action the proposal to amend Parts 2, 73, 74, and 78 of the rules to relax the equipment authorization procedures for broadcast and cable relay equipment. Accordingly, pursuant to the authority contained in Section 4(i) and 303 of the Communications Act of 1934, as amended, IT IS ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Notice of Proposed Rule Making*, GEN Docket No. 87-552, 3 FCC Rcd 536 (1988).

[2] *See* 47 CFR Sections 2.901-2.1065.

[3] The measurement and other data is retained by the applicant. *See* 47 CFR Sections 2.938 and 2.975(g). This data may be requested by the Commission. *See* 47 CFR Sections 2.936, 2.946 and 2.975(e).

[4] *See* 47 CFR Sections 2.938 and 2.955. This data may be requested by the Commission. *See* 47 CFR Sections 2.936, 2.946 and 2.953(b).

[5] *See* 47 CFR Sections 2.803 and 2.805.

[6] *See Report and Order*, GEN Docket No. 83-10, 49 FR 03991, February 1, 1984.

[7] *See* 47 CFR Sections 2.1400, 73.53, 73.644, 73.1660, 74.550, 74.655, and 78.107.

[8] *See* 47 CFR Sections 73.128, 74.451, 74.655, 74.750, 74.851, 74.939, 74.952, 74.1250, and 78.107.

[9] Comments were filed by the American Petroleum Institute (API), Community Broadcasters Association (CBA), Harris Corporation - Farinon Division (Harris), Information Transmission Systems Corp. (ITS), M/A-COM's Microwave Associates Communications Division (MAC), the National Association of Broadcasters (NAB), the Society of Broadcast Engineers, Incorporated (SBE), and the Special Industrial Radio Service Association (SIRSA). API and SIRSA filed reply comments.

[10] A copy of the FCC Laboratory's report on these investigations has been inserted in the record of this proceeding.

[11] The equipment authorization procedures for two types of equipment considered in this proceeding have already been relaxed. The Commission, in a separate proceeding conducted during the pendancy of this proceeding, amended its rules to allow FM broadcast translators and boosters to be authorized under the notification procedure. *See Report and Order*, MM Docket No. 88-140, FCC 90-375, 55 FR 50690,_____FCC Rcd_____(adopted November 8, 1990). This change was made to remove inconsistencies between the Part 73 and Part 74 equipment authorization requirements for similar equipment.

[12] *See Report* and Ord er, GEN Docket No. 82-242, FCC 83-3, 48 FR 3614, (adopted January 13, 1983).

[13] The Commission will issue further information regarding these requirements in a future Public Notice.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-101

In the Matter of

Amendment of Section 73.606(b), RM-5455
Table of Allotments,
TV Broadcast Stations.
(Anniston, Alabama)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 11, 1991

By the Commission:

1. The Commission has before it an Application for Review, filed by Jacksonville State University ("JSU"), seeking review of the *Memorandum Opinion and Order* (*"MO & O "*) in this proceeding, 4 FCC Rcd 5984 (1989). The *MO & O* denied JSU's petition for reconsideration of the *Report and Order* (" *R & O* ") in this proceeding, 2 FCC Rcd 528 (1987), which had denied JSU's request to allot VHF television Channel 4 to Anniston, Alabama, and reserve the channel for non-commercial educational use. Columbus Television, Inc. ("Columbus TV"), licensee of co-channel Station WCIQ(TV), Columbus, Mississippi, and Cook Inlet Television Partners, L.P. ("Cook Inlet"),[1] licensee of co-channel Station WSMV(TV), Nashville, Tennessee, filed oppositions to JSU's Application for Review. JSU filed a reply.

BACKGROUND

2. The staff's *R & O* denied JSU's proposal for allotment of Channel 4 because, from anywhere in the restricted area a transmitter site could be placed,[2] the northern half of Anniston would be shadowed by a mountain with a continuous ridge ranging from approximately 300 to 580 meters (1000 to 1900 feet) above mean sea level. The staff determined that JSU had not demonstrated that there was an acceptable site from which a minimum field strength of 74 dBu could be provided over the entire community, and concluded that the proposal would therefore violate the provisions of Section 73.685 of the Commission's Rules.

3. On reconsideration of the *R & O*, the staff affirmed its denial of JSU's counterproposal, and rejected JSU's request for waiver of Section 73.685. Citing the difficulty at the allotment stage of evaluating actual transmitter sites, the staff indicated that the Commission will generally consider a waiver of the city grade coverage requirement only in an application context. Only at that stage, the staff noted, can it evaluate concrete transmitter site proposals. With respect to JSU's proposal to use translators to compensate for deficiencies in the city grade coverage, the staff rejected JSU's reliance on *WSTE - TV*, 75 FCC 2d 52 (1979), and other similar cases allowing the use of translators. The staff observed that the cases cited addressed waivers of the requirement for primary station coverage at the application stage, not the allotment stage. In addition, the staff observed that *WSTE - TV* was a case in which actual translator applications were pending, while the instant case involved no guarantee that translator applications would be filed or granted. Finally, in responding to JSU's assertion that there is no absolute requirement in the Commission's rules for shadow-free coverage of a community, the staff noted that in those instances in which allotment proposals have been granted despite some shadowing, the shadowing was minor and the petitioner had demonstrated the availability of sites from which city grade coverage could be provided.

THE PLEADINGS

4. In its Application for Review, JSU contends that the staff's denial of its petition for reconsideration contravenes Commission regulations, policy, and case precedents. JSU argues that the staff action ignores our decision in *Oak Beach and Bay Shore, New York*, 2 FCC Rcd 1293 (1987) (" *Oak Beach* "), in which we waived the principal city coverage requirements at the allotment stage because there was only one transmitter site available. JSU argues that in cases where the Commission can as readily determine the extent of the waiver required at the allotment stage as it could at the application stage, an allotment stage waiver must be fully considered, citing *Greenwood, Seneca, Aiken, Clemson, South Carolina and Biltmore, North Carolina*, 3 FCC Rcd 4108 (1988) (" *Greenwood, Seneca* "). In an effort to establish that this is such a case, JSU points to record evidence establishing that there is only a very small area in which a site for Channel 4 complying with the Commission's minimum distance separation requirements may be located, and concludes that this case is tantamount to one in which only one transmitter site is available. Based on this conclusion, JSU believes consideration of its waiver request is warranted, and advances two reasons in support of a waiver.

5. First, JSU contends that from the restricted site for channel 4, JSU's proposed station would provide the equivalent of a city grade signal over Anniston. JSU submits a new engineering study to bolster this claim. The study assumes that JSU's station would operate with maximum allowable facilities. Based on this assumption, JSU concludes that a Channel 4 station would provide a signal strength of at least 47 dBu to an average receiver in at least 90 percent of the locations in Anniston at least 90 percent of the time. JSU's engineering consultant claims that this is equivalent to delivering over all of Anniston a median city grade signal of 74 dBu field strength to 50 percent of the locations in the community 50 percent of the time.

6. Second, JSU argues that translators may be used to "insure substantial compliance" with the mandatory city grade coverage requirements of Section 73.685(a). JSU argues that the staff failed to ascribe sufficient weight to Commission recognition of the general availability of translators to fill in shadowed areas, citing *tv USA / Pueblo, Ltd.*, 65 RR 2d 1550 (1988). JSU also alleges that the staff ignored the availability of TV boosters, which, according to JSU, eliminates the "normal concern with mutually exclusive applications" that would be applicable

to translator fill-in service. JSU also argues that boosters do not constitute a "secondary service," and are therefore a permanent solution to city grade coverage deficiencies.

7. In opposition, Columbus TV attacks JSU's claim that *Oak Beach* is relevant precedent. Columbus TV notes that the *Oak Beach* case involved allotment of a first local service, but in this case Anniston already receives local commercial service from station WJSU-TV, and could receive noncommercial educational city grade service if Channel *16 at Munford, Alabama, were activated. Columbus TV also takes issue with JSU's engineering study because it lacks sufficient information to properly review the methodology employed, and because the study assumes a Channel 4 station at maximum facilities. Noting that a station with maximum facilities would require an antenna tower 640 meters (2100 feet) tall, Columbus TV questions whether an assumption of maximum facilities is reasonable. Columbus TV argues that skepticism is particularly warranted in light of a tall tower's potential impact on aeronautical navigation. Columbus TV submits the affidavit of an airspace consultant indicating potential difficulties with obtaining FAA approval of the site. As to JSU's proposed use of TV boosters to remedy its deficient city-grade coverage, Columbus TV argues that boosters are "nothing but on-channel translators," and therefore irrelevant to allotment decisions concerning full service stations. In the alternative, Columbus TV argues that boosters are less desirable than translators as a means of providing city grade service because they can interfere with the signal of the primary station.

8. Cook Inlet echoes Columbus TV's opposition. Cook Inlet first notes that the Commission generally does not waive principal city coverage requirements at the allotment stage because normally neither the successful applicant nor the actual transmitting facilities can be determined with any certainty. Cook Inlet argues that *Oak Beach* is distinguishable from the instant case because it involved a proposal for which only one site was available, height limitations were known, and the station's signal could be reasonably expected to propagate farther than indicated by normal predictions. Cook Inlet also maintains that JSU's engineering showing is insufficient. As for JSU's argument concerning tranlators, Cook Inlet argues that the efficacy of translators to cure coverage deficiencies cannot be evaluated at the allotment stage with any degree of confidence, because no actual applications would be pending for the translators. For this reason, Cook Inlet submits that the staff properly distinguished *WSTE - TV*, since that case involved the evaluation of pending translator applications. Cook Inlet also questions the applicability of *tv USA / Pueblo, Ltd.* to this case, because *tv USA / Pueblo, Ltd.* stressed the availability of translators as a means of providing fill-in service to areas other than the community of license.

9. In reply, JSU argues that a waiver is justified, contending that *Oak Beach*'s "basic premise" is that a waiver can be granted at the allotment stage when possible sites are restricted, and no purpose would be served by awaiting the application stage. JSU attacks Columbus TV's skepticism about FAA approval of a tower with a height greater than 500 feet. JSU points out that the FAA has not made a hazard determination regarding JSU's proposed tower, or any other tower in the vicinity. JSU also submits "additional supporting data" for its engineering study.

DISCUSSION

10. We deny the Application for Review. JSU has not made an adequate showing of transmitter site availability, nor has it met its burden of justifying a waiver of Section 73.685 of the rules. Therefore, we conclude that the staff acted consistent with Commission rules, policy, and precedent when it distinguished allotment proceedings from application proceedings, and when it declined to consider the potential availability of translators as a means of providing principal city coverage. We also decline to consider the potential availability of a boosters as an allotment tool.

11. Section 73.611(a)(4) of the Commission's rules allows the allotment of a television channel to a "restricted site" only "upon a showing that a transmitter site is available that would meet the minimum separation requirements [of the Commission's rules] and the minimum field strength requirements of § 73.685." As the record indicates, there is only an extremely small geographical area in which a Channel 4 transmitter could be located and meet required separations to other stations. [3] There is no indication in the record that any of this land is actually available for use as a broadcast tower site. Therefore, even assuming a waiver of Section 73.685 is warranted in this case, we are unable to conclude that there is an available site that would comply with distance separation requirements.

12. For the same reason, JSU's reliance on our decision in *Oak Beach* is misplaced. Like this case, *Oak Beach* involved a limited geographical area in which a site could be located. The record in *Oak Beach*, however, firmly established the availability of one and only one site, based on a lease agreement between the petitioner and the National Park Service. In addition, that lease included specific terms as to the height of the antenna structure that would be allowed. Thus, the factual situation in *Oak Beach* was such that the Commission could as readily determine the extent of any waiver required in the rule making context as it could subsequently in the application context.[4] Where such factual circumstances are not present, however, we have steadfastly declined to consider waivers at the allotment stage. As we stated in *Greenwood, Seneca*, "for good reason . . . consideration [of city grade coverage waivers] is generally limited to the application context. It is generally only at that stage that the Commission has before it the information necessary to make informed judgments." 3 FCC Rcd at 4109.[5]

13. Careful consideration of the evidence submitted by JSU in this case reinforces our belief that waivers of city grade coverage requirements in the allotment context should only be considered in the most unusual circumstances. While JSU submits an engineering study designed to show that any city grade waiver required would be at the most *de minimis*, that study *assumes* a station operating at maximum facilities. An extremely tall tower would be required to operate as assumed. It is our experience that the construction of tall towers involves such significant regulatory, technical, and financial constraints that it is unreasonable simply to assume that such facilities can be constructed.[6]

14. We decline to consider the potential availability of translator or booster services as a relevant factor in this allotment proceeding. Section 73.611(a)(4) of our rules contemplates the allotment of a site restricted channel based upon a showing as to the availability of the primary station's transmitter *site*, not upon a showing of the avail-

ability of the two or more transmitter *sites* that would be required if boosters or translators are used. Furthermore, we believe this limitation on consideration of the availability of secondary services is warranted in order to avoid burdening the allotment process with the need to engage in a highly speculative analysis as to whether spectrum for a secondary service will eventually be available and whether that secondary service will adequately remedy the shortfall in the primary station's coverage. Finally, even if we were to presume in allotment proceedings the general availability of spectrum for new secondary uses, as JSU requests, that assumption would undermine the rationale for any waiver of our coverage requirements. Consistent with that assumption, it would be proper to conclude that JSU can readily provide service using secondary services. Because this option would fully comply with our rules, we would prefer it to the option of allotting a technically flawed primary service that would require a waiver.[7]

15. Accordingly, IT IS ORDERED That the Application for Review filed by Jacksonville State University IS DENIED.

16. IT IS FURTHER ORDERED That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Cook Inlet is the licensee of WSMV(TV) pursuant to an assignment from Gillett Broadcasting of Tennessee, Inc., effective June 8, 1989. Gillett had participated in this proceeding from its inception.

[2] To avoid short-spacing with co-channel TV stations WTVY, Dothan, Alabama, WCBI(TV), Columbus, Mississippi, and WSMV(TV), Nashville, Tennessee, Channel 4 could be allotted to Anniston only if the site was restricted to an area at least 37.2 kilometers (23.2 miles) east of the community.

[3] The area is approximately 0.75 square kilometer (0.29 sq. mile) in size.

[4] *Cf. Woodstock and Broadway, VA*, 3 FCC Rcd 6398 (1988) (Determinations in allotment proceedings of compliance with city grade coverage requirements may be evaluated using technical assumptions normally used in application proceedings if there will be only one applicant for the allotment and if the potential applicant provides the relevant information that it would be required to submit in connection with its application).

[5] Contrary to JSU's assertions, *Greenwood, Seneca* does not support JSU's position. In *Greenwood, Seneca*, we also refused to waive city grade coverage requirements at the allotment stage, constrasting the circumstances in that case to the circumstances in *Oak Beach*.

[6] *See Greenup, Kentucky*, 6 FCC Rcd 1497, n. 7 (1991).

[7] *tv USA/Pueblo, Ltd.*, cited by JSU, recognizes the value of translators in filling in shadowed areas but does not stand for the proposition that we should consider the potential use of translators as a relevant factor in the allotment process.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

ORDER

Adopted: April 1, 1991; Released: April 2, 1991

By the Deputy Chief, Common Carrier Bureau:

1. On March 20, 1991, the American Public Communications Council (APCC) filed a "Request for Extension of Time," moving that we extend the deadlines for filing initial comments and reply comments in the above-captioned proceeding to April 12 and April 26, 1991, respectively. That request was denied on March 28, 1991. *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CC Docket No. 91-35, Order, DA 91-365 (released March 28, 1991). Having reconsidered, we now extend the comment period.

2. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Request for Extension of Time filed by the American Public Communications Council IS GRANTED. Initial comments in the above-captioned proceeding shall be filed by **April 12, 1991**, and reply comments shall be filed by **April 26, 1991**.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of

NEW ENGLAND TELEPHONE
AND TELEGRAPH CO.

NEW YORK TELEPHONE CO.

PACIFIC BELL

SOUTHWESTERN BELL
TELEPHONE COMPANY

Apparent Violations of the
Commission's Rules

ORDER

Adopted: April 2, 1991; Released: April 3, 1991

By the Chief, Accounting and Audits Division:

1. This Order revises the procedural schedule in the enforcement proceedings that the Commission initiated on November 9, 1990, against New England Telephone and Telegraph Co. (NET), New York Telephone Co. (NYT), Pacific Bell (Pacific), and Southwestern Bell Telephone Company (Southwestern).[1] Previously, any comments in these proceedings were due April 4, 1991, and replies were due April 19, 1991.[2] Under the revised schedule, comments will be due April 11, 1991, and replies will be due April 26, 1991.

2. The above extensions are occasioned by our March 25, 1991 data request that requires the National Exchange Carrier Association, Inc. (NECA) to submit certain information for inclusion in the record in these proceedings. NECA's response to that request is due April 4, 1991.[3]

3. On March 26, 1991, Allnet Communications Services, Inc. (Allnet) filed a motion requesting that we extend the comment cycle in these proceedings seven days to give it and any other parties adequate time to study and evaluate NECA's response to our data request. Although we do not routinely extend procedural deadlines, we believe that we should provide interested persons with an opportunity to evaluate NECA's response before any comments are due.

4. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), and 5(c) of the Communications Act of 1934, as amended, 47 C.F.R. §§154(i), (j), 155(c), and the authority delegated thereunder through Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§0.91, 0.291, the procedural schedule in the subject proceedings IS REVISED as specified above.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief, Accounting and Audits Division

FOOTNOTES

[1] New England Telephone and Telegraph Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7190 (1990); New York Telephone Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7193 (1990); Pacific Bell, *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7196 (1990); Southwestern Bell Telephone Co., *Notice of Apparent Liability for Forfeiture and Order to Show Cause*, 5 FCC Rcd 7199 (1990).

[2] New England Telephone and Telegraph Co., DA 91-312 (Com. Car. Bureau, Mar. 14, 1991).

[3] This response was originally due April 2, 1991. *See* Letter from Kenneth Moran, Chief, Accounting and Audits Division, to Daniel M. Malloy, Director - Industry Relations, NECA (Mar. 25, 1991). However, we extended that deadline for two days so that NECA's response would not be due immediately after NECA's April 1, 1991 filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company — Transmittal No. 2885

Revisions to Tariff F.C.C. No. 12

ORDER

Adopted: April 2, 1991; Released: April 4, 1991

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2885 to introduce Virtual Telecommunications Network Service (VTNS) Option 86 under which AT&T provides voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations.

2. Williams Telecommunications Group, Inc. (Williams), US Sprint Communications Company Limited Partnership (Sprint), and Competitive Telecommunications Association (CompTel) filed petitions to reject or suspend and investigate Option 86 on February 18, 1991 and February 19, 1991, respectively. AT&T filed a reply on March 1, 1991.

3. Petitioners contend that Option 86 raises the same issues as the Tariff 12 options remanded by the U.S. Court of Appeals in the *Tariff 12 Remand* [1] and must be reviewed in light of the remand. *See* Sprint Petition at 5; Williams Petition at 2 & n.3; CompTel Petition at 4. Petitioners argue that AT&T has failed to demonstrate that Option 86 is an integrated service package that is "unlike" its component services and thus has failed to justify the discrimination between Option 86 and AT&T's other services. *See* Sprint Petition at 6-9; Williams Petition at 3-14; CompTel Petition at 4-6. Petitioners further allege that even if Option 86 could qualify as an integrated service package, its rates vary without justification from other options under Tariff 12 and thus are discriminatory. *See* Sprint Petition at 8-9; Williams Petition at 14-20 (comparing the rates for Option 86 to those for Option 6); CompTel Petition at 8-10 (also contending that the Commission will need to review the underlying contracts to determine reliably whether price differences between Option 86 and other Tariff 12 options are justified).

4. Williams and CompTel also argue that Option 86 impermissibly bundles 800 Service with SDN Service for the application of the Domestic Usage Volume Pricing Plan in violation of Section 201(b) of the Communications Act. *See* Williams Petition at 18-19; CompTel Petition at 6-8 (also alleging that AT&T is unlawfully leveraging its market power in international services). These petitioners also claim that Tariff 12 packages violate the Commission's resale policy because their customized nature prevents them from being used by resellers. *See* Williams Petition at 26-27; CompTel Petition at 6 n.4.

5. Williams contends that Option 86 is not generally available and that it violates the Commission's policy against geographic rate deaveraging. Williams Petition at 22-25, 28-29. Williams further claims that the Commission should adopt, or require AT&T to adopt, safeguards to remedy any unlawful discrimination that will occur if Option 86 takes effect. *Id.* at 20-22. Williams also alleges that if Tariff 12 is found to be a system of unlawful preferences, Tariff 12 customers could be liable to the Federal Government for treble the value of the preference under Section 503(a) of the Communications Act, 47 U.S.C. § 503(a). *Id.* at 20-21 & n.24.

6. AT&T replies that the *Tariff 12 Remand* "creates no basis to reject or suspend new or revised VTNS offerings." AT&T Reply at 7. Rather, AT&T argues that it "confirms AT&T's right 'to compete effectively in the large user market.'" *Id.* at 7 (quoting *Tariff 12 Remand*, 917 F.2d at 42). Further, AT&T asserts that petitioners here repeat verbatim the same arguments they have raised in opposition to every VTNS Option that has been filed since the *Tariff 12 Remand*. *Id.* at 2. Consequently, in response to charges that Option 86 is discriminatory, that it unlawfully bundles SDN and 800 Service, that AT&T has deaveraged VTNS rates, and that AT&T's cost support is inadequate, AT&T denies those charges and cites its previously filed replies to Options 74-80. *Id.* at 2 n.******.

7. AT&T also argues that comparisons among individual rate elements in different VTNS Options are not meaningful because Tariff 12 Options are integrated service packages which necessarily contain different individual rate elements and different tradeoffs among rate elements. *Id.* at 3-4. In addition, says AT&T, Williams only compares switched access elements in Options 6 and 86 and in those comparisons only examines the average revenue per minute, not the actual rate. *Id.* at 4-5.

8. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2885, the petitions filed by Sprint, Williams, and CompTel, and AT&T's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection.

9. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See Tariff 12 Remand*. Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission's decision in the CC Docket No. 87-568 remand proceedings. Therefore, Transmittal No. 2885 takes effect subject to the outcome of the remand proceedings in CC Docket No. 87-568.

10. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2885 filed by US Sprint Communications Company Limited Partnership, Williams Telecommunications Group, Inc., and Competitive Telecommunications Association, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] See *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30 (D.C.Cir. 1990) (*Tariff 12 Remand*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL RURAL
TELECOMMUNICATIONS
COOPERATIVE,
Complainant,

v. File Nos. E-91-44
E-91-45

SOUTHERN SATELLITE
SYSTEMS, INC.
and NETLINK USA,
Defendants.

ORDER

Adopted: April 5, 1991; Released: April 12, 1991

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On January 16, 1991, National Rural Telecommunications Cooperative (NRTC) filed the above-captioned complaint directed against Southern Satellite Systems, Inc. (Southern) and Netlink USA (Netlink). The complaint alleged that, in their provision of domestic satellite services, Southern and Netlink (Defendants) were engaged in unlawful discrimination against NRTC in willful violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a),[1] and Section 119(a)(6) of the Satellite Home Viewer Act of 1988 (SHVA).[2]

2. On March 12, 1991, Defendants filed motions for a more definite and certain statement of the allegations asserted against each of them, alleging that the complaint failed to contain specific allegations of wrongdoing by them, contrary to the requirements of Section 1.721 of the Commission's rules, 47 C.F.R. § 1.721,[3] and also failed to contain "appropriate allegations showing such evidence that will identify, with reasonable certainty, the amount of damages for which recovery is sought" in violation of Section 1.722(a) of the rules.

3. On March 22, 1991, NRTC filed a partial opposition to such motions stating its belief that its complaint identified with specificity the relevant factual and legal issues raised and the damages sought. Nevertheless, NRTC provided certain additional information regarding Defendants' alleged discriminatory conduct and the damages sought in order "to assist" Defendants in answering the complaint.[4]

4. On March 26, 1991, because the pleading cycles with respect to the pending motions for a more definite and certain statement of the complaint were still open, we determined that answers to the subject complaints and to a similar complaint would not be required until a reasonable period after we had ruled on such pending motions.[5]

5. Defendants subsequently replied that NRTC's operative complaint is now an "amalgam" of allegations from more than one pleading and that they would be prejudiced if they had to respond to its current "amorphous" state.[6] Accordingly, Defendants argue that NRTC must be required to amend its complaint to conform with the Commission's rules.

6. The above-referenced pleadings have been duly considered. We cannot conclude that the complaint filed by NRTC on January 16, 1991 satisfies the requirements of Section 1.720 *et seq.* of the Commission's rules governing the filing of formal complaints. For example, the rules specify that the written record for resolving formal complaint proceedings generally will consist of a complaint, the defendant's answer thereto, and an optional reply to the answer.[7] Other than a "supplemental complaint" for damages filed pursuant to the provisions of Section 1.722 of the rules, NRTC has cited no precedent for its contention that a formal complaint may properly encompass multiple pleadings filed on differing dates. Accordingly, if NRTC wishes to prosecute its complaint in these proceedings, it may file, and serve on Defendants, an amended complaint in proper form within twenty days from release of this Order.[8]

7. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that Defendants' motions to make the complaint in this matter more definite and certain ARE GRANTED.

8. IT IS FURTHER ORDERED that NRTC may file an amended complaint within twenty days of the release of this Order.

9. IT IS FURTHER ORDERED that Defendants shall file their answer or answers to any amended complaint filed pursuant to paragraph 8, above, within fourteen days thereafter.

10. IT IS FURTHER ORDERED that Defendants' Motions to Hold Proceedings in Abeyance filed March 8, 1991 in these proceedings ARE DENIED to the extent they sought relief inconsistent with our action herein, and action on such motions OTHERWISE IS DEFERRED pending our further order.

11. IT IS FURTHER ORDERED that this Order IS EFFECTIVE on its adoption.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTES

[1] Section 202(a) provides as follows:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality.

or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

[2] Pub. L. No. 100-667, 102 Stat. 3935 (1988).

[3] Section 1.721 of the rules provides, in pertinent part, that a formal complaint must be clear, concise, explicit and contain, *inter alia*, facts which, if proven true, would constitute a violation of the Communications Act and/or order and/or regulation of the Commission.

[4] Partial Opposition to Motions For a More Definite and Certain Statement of Allegations, at 3 (filed Mar. 22, 1991).

[5] National Rural Telecommunications Cooperative v. Southern Satellite Systems, Inc., Order, DA 91-349 (Com. Car. Bur. released Apr. 5, 1991).

[6] Reply to Partial Opposition to Motions For a More Definite and Certain Statement, at 2 (filed Mar. 29, 1991). Defendants note that, under Section 1.724(c) of the Commission's rules, they are required to respond specifically to each averment in the complaint. Under that rule, Defendants are entitled to make denials as specific denials of paragraphs of the complaint.

[7] *See* Sections 1.720 and 1.726 of the Commission's rules. *See also* Section 1.733(b) of the rules which provides as follows:

> [a]ll averments of claims or defenses in complaints and answers shall be made in numbered paragraphs. The contents of each paragraph shall be limited as far as practicable to a statement of a single set of circumstances. Each claim founded on a separate transaction or occurrence and each affirmative defense shall be separately stated to facilitate the clear presentation of the matters set forth.

[8] NRTC may incorporate by specific reference in such amended complaint information previously filed in these or other Commission proceedings.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-384

In the Matter of

Amendment of Section 73.202(b), RM-7286
Table of Allotments,
FM Broadcast Stations.
(Bethlehem, West Virginia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1991; Released: April 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5277 (1990), issued in response to a petition filed by Bethlehem Radio, Inc. (petitioner), proposing the substitution of FM Channel 288B1 for Channel 288A at Bethlehem, West Virginia,[1] and the modification of the license for Station WHLX(FM) at Bethlehem to specify the higher powered channel. Petitioner filed comments in support restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 288B1 for Channel 288A at Bethlehem, West Virginia, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction of 14.3 kilometers (8.9 miles) northwest of Bethlehem to accommodate petitioner's desired transmitter site.[2] Concurrence of the Canadian government has been obtained, since Bethlehem is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's license for Station WHLX(FM) at Bethlehem to specify operation on Channel 288B1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bethlehem, West Virginia	288B1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Bethlehem Radio, Inc., for Station WHLX(FM), Bethlehem, West Virginia, IS MODIFIED to specify operation on Channel 288B1, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In paragraph 4 of the *Notice*, the present and proposed channel numbers were inadvertently listed as 228A and 228B1, respectively.

[2] The coordinates for Channel 288B1 at Bethlehem are North Latitude 40-09-32 and West Longitude 80-45-58.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-598

In the Matter of

Amendment of Section 73.202(b), RM-7506
Table of Allotments,
FM Broadcast Stations.
(Mountain Home, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1991; Released: April 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 7389 (1990), issued in response to a petition filed on behalf of Mountain Home Radio Station (petitioner), licensee of Station KPFM(FM), Channel 288A, Mountain Home, Arkansas, proposing the substitution of Channel 288C2 for Channel 288A and the modification of its license to specify operation on the higher-powered channel. Petitioner filed comments in support of the proposal. No other comments were received.

2. As stated in the *Notice*, Channel 288C2 can be allotted to Mountain Home, Arkansas, at the petitioner's present site,[1] consistent with the minimum distance separation requirements of the Commission's Rules.[2]

3. We believe the public interest would be served by substituting Channel 288C2 for Channel 288A at Mountain Home, Arkansas, since it would provide an additional expanded coverage FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KPFM(FM) to specify operation on Channel 288C2 at Mountain Home, as requested.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Mountain Home, Arkansas	252A,288C2,298C1

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to Mountain Home Radio Station for Station KPFM(FM), Mountain Home, Arkansas, IS MODIFIED effective **May 28, 1991,** to specify operation on Channel 288C2 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station KOKR(FM) as follows: Newport Broadcasting Co., P.O. Box 989, Blytheville, Arkansas 72316.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the licensed Station KPFM(FM) are 36-20-55 and 92-24-01.

[2] As stated in the *Notice*, we recognize that the allotment of Channel 288C2 conflicts with the presently licensed operation of Station KOKR(FM) on Channel 288A at Newport, Arkansas. However, Station KOKR(FM) was ordered to move to Channel 264A at Newport, Arkansas. *See* MM Docket No. 87-563, 5 FCC Rcd 2579 (1990). Station KOKR(FM) has filed an application for modification of its license for Channel 264A at Newport (File No. BMLH-901017KA). A copy of this *Order* will be served on Station KOKR(FM).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-102

In the Matter of

Amendment of Section 73.202(b), RM-7288
Table of Allotments,
FM Broadcast Stations.
(Holly Springs and Byhalia,
Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1991; Released: April 12, 1991

By the Acting Chief, Allocations Branch:

1. Lois B. Crain (petitioner), permittee of Station WHLE(FM), Channel 235A, Holly Springs, Mississippi, has filed a petition for rule making proposing the reallotment of Channel 235A from Holly Springs to Byhalia, Mississippi, as that community's first local service. Petitioner also seeks the modification of her construction permit for Station WHLE(FM) to specify the change of community of license from Holly Springs to Byhalia.

2. In support of her proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] Petitioner expresses her desire to provide a first local broadcast service to Byhalia, Mississippi. Petitioner states that the allotment of Channel 235A to Byhalia (population 757)[2] is mutually exclusive with the present allotment of Channel 235A at Holly Springs (population 7,285), because the community separation is less than the required 115 kilometers for Class A allotments. According to petitioner, Holly Springs will continue to be served by Stations WKRA-FM and WKRA-AM. No stations are authorized at Byhalia. Petitioner states that she proposes to relocate her transmitter site because a facility located at the current transmitter site cannot provide city grade coverage to Byhalia.

3. We believe that the public interest could be served by proposing the reallotment of Channel 235A from Holly Springs to Byhalia, Mississippi, as it would provide Byhalia with its first local broadcast service. We note that petitioner proposed a transmitter site 11.2 kilometers (7.0 miles) [3] southeast of Byhalia. This site is short spaced to vacant but applied for Channel 235A at Ripley, Tennessee,[4] and to two applications for that channel. It is also short spaced to Channel 234A at Bolivar, Tennessee, but fully spaced to Station WYDB's construction permit (BPH-900111MG) for that channel. However, a staff engineering analysis has found an alternate site 12.6 kilometers (7.8 miles) southeast of Byhalia which would avoid these conflicts.[5] Therefore, we shall propose to modify the construction permit for Station WHLE(FM) to change the community of license and specify operation on Channel 235A at Byhalia, Mississippi, at the alternate site. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest for the use of Channel 235A at Byhalia or require the petitioner to demonstrate the availability of an additional equivalent channel at that community. Finally, we will serve Station WYDB, Channel 234A, Bolivar, Tennessee, and the two applicants for Channel 235A at Ripley, Tennessee, with a copy of this *Notice*.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Holly Springs, Mississippi	224A,235A	224A
Byhalia, Mississippi	---	235A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 3, 1991,** and reply comments on or before **June 18, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Vincent J. Curtis, Jr.
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036-2679
(Counsel to the petitioner)

7. IT IS ORDERED,, that a copy of this *Notice* of *Proposed Rule Making* be sent, by Certified Mail, Return Receipt Requested, to the following:

Craig Fitzhugh
121 Church Street
Ripley, Tennessee 38063
(871008MH)

T/R Lauderdale
Broadcasting Co.
372 S. Jefferson Street
Ripley, Tennessee 38063
(871007MA)

Johnny W. Shaw and Opal J. Shaw
P.O. Box 191
Bolivar, Tennessee 38008
(BPH-900111MG)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM

Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Amendment to the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *pet. for recon. granted in part*, 5 FCC Rcd 7094 (1990).

[2] Population figures are from the 1980 U.S. census.

[3] Petitioner's proposed coordinates are 34-50-03 and 89-34-32.

[4] MM Docket 87-619 substituted Channel 235A for Channel 231A at Ripley, Tennessee. *See* 4 FCC Rcd 6170 (1989).

[5] The coordinates for Channel 235A at Byhalia are 34-46-10 and 89-37-57.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-372

In the Matter of

Amendment of Section 73.202(b),	RM-7300
Table of Allotments,	
FM Broadcast Stations.	
(Spokane, Washington)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1991; Released: April 12, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 5177 (1990), issued in response to a petition filed by Pacific Metrocom Northwest, Inc. (petitioner), proposing the substitution of FM Channel 280C2 for Channel 280C3 at Spokane, Washington, and the modification of its license for Station KVXO(FM) to specify operation on the higher powered channel. Petitioner filed comments in support of the *Notice* restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 280C2 for Channel 280C3 at Spokane, Washington, since it could provide the community with a wide coverage area FM station. Channel 280C2 can be allotted to Spokane in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.7 kilometers (7.3 miles) southeast of the community to accommodate petitioner's desired transmitter site.[1] Concurrence by the Canadian government has been obtained since Spokane is located within 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify the license of Station KVXO(FM) at Spokane to specify operation on Channel 280C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 28, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Spokane, Washington	225C, 229C, 245A, 251C, 255C, 260C, 280C2, 284A, 289C, 300C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Pacific Metrocom Northwest, Inc., for Station KVXO(FM), Spokane, Washington, IS MODIFIED to specify operation on Channel 280C2 in lieu of Channel 280C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 280C2 at Spokane are North Latitude 47-35-42 and West Longitude 117-17-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Various Locations)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 22, 1991; Released: April 12, 1991

By the Acting Chief, Allocations Branch:

1. This *Order* amends Section 73.202(b) of the Commission's Rules, the Table of FM Allotments, to specify the classes of channels allotted to various communities. These amendments are necessary to reflect changes that have been authorized in response to applications filed by licensees and permittees operating on these channels. This action is taken pursuant to *Revision of Section 73. 3573 (a)(1) of the Commission's Rules Concerning the Lower Classification of an FM Allotment, 4 FCC Rcd 2413 (1989).* The attached Appendix shows the Table, as amended for those communities.

2. This action constitutes an editorial change in the Table of FM Allotments. Therefore, a public notice and comment proceeding is unnecessary. *See* 5 U.S.C. 553(b)(A) and (B).

3. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

Community	Channel Deleted	Channel Added
Greeley, Colorado	241C	241C1
Gainesville, Florida	279C	279C1
Jacksonville, Florida	297C	297C1
Live Oak, Florida	251C1	251C2
Miami, Florida	256C	256C1
Tallahassee, Florida	235C	235C1
West Palm Beach, Florida	300C	300C1
Macon, Georgia	287C	287C1
Lewiston, Idaho	243C	243C1
Cedar Rapids, Iowa	251C, 275C, 283C	251C1, 275C1, 283C1
Sioux City, Iowa	238C, 250C	238C1, 250C1
Pittsburg, Kansas	245C	245C1
Detroit Lakes, Minnesota	236C	236C1
Duluth, Minnesota	235C	235C1
Vicksburg, Mississippi	254C	254C1
St. Louis, Missouri	229C, 251C	229C1, 251C1
Billings, Montana	246C1	246C2
Great Falls, Montana	291C	291C1
Norfolk, Nebraska	234C	234C1
North Platte, Nebraska	278C	278C1
Seward, Nebraska	245C	245C1
Newton, New Jersey	279B	279B1
Roswell, New Mexico	293C	293C1
Enid, Oklahoma	245C	245C1
Jackson, Tennessee	281C	281C1
Belton, Texas	292C3	292A
Del Rio, Texas	242C	242C1
Edinburg, Texas	300C	300C1
El Campo, Texas	245C	245C1
Hillsboro, Texas	273C	273C1
San Angelo, Texas	234C	234C1
San Antonio, Texas	241C	241C1
Victoria, Texas	254C	254C1
Cedar City, Utah	235C	235C1
Martinsville, Virignia	242C	242C1
Janesville, Wisconsin	260B	260B1

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-82

In re Applications of

CADDO BROADCASTING COMPANY (hereafter "Caddo") File No. BPH-891016ML

THE RIVER BROADCASTING CO., INC. (hereafter "River Broadcasting") File No. BPH-891109MH

For Construction Permit
for a New FM Station on Channel 225A
in Hot Springs Village, Arkansas

HEARING DESIGNATION ORDER

Adopted: March 26, 1991; Released: April 12, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Caddo.* Section III, Item 3 (new form) of FCC Form 301 (June 1989) requires that an applicant specify each source of funds, including the name, address, telephone number, contact person if the source is an entity, any relationship of the source to the applicant, and the amount of funds to be supplied by each source. Caddo has not provided all the information requested in Item 3. Accordingly, Caddo must submit an amendment which gives all the information required by Section III, Item 3 to the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

3. *Areas & Populations.* Data submitted by the applicants indicate that there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and a place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Caddo shall submit an amendment which contains the information required by Section III, Item 3 (new form) of FCC Form 301, to the presiding Administrative Law Judge within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

8. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 12, 1991

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. All responses to individuals are published in the FCC Record.

These decisions are available for public inspection. Each month, the Managing Director releases a Public Notice listing the decisions he has made on these matters. The decisions are placed in General Docket 86-285. A copy of the decision is also placed in the appropriate docket, if one exists.

The following Managing Director decisions are released for information:

GTE Airfone, Inc. - Request for a fee determination and refund - **Granted** - A total of $189,750 will be refunded (March 8, 1991).

LeVeen, Jonathan Lee - Request for a refund of a hearing fee for a new FM station at Thomaston, Maine - **Granted** - A total of $6,000.00 will be refunded (March 20, 1991).

Platte Broadcasting Company, Inc. - Request for a refund of a hearing fee for a new FM station in Plattsmouth, Nebraska - **Denied** - (March 8, 1991).

Mobile Broadcast Service, Inc. - Request for a refund of a hearing fee for a new AM station at Prichard, Alabama - **Granted** - A total of $6,760.00 will be refunded (March 11, 1991).

Ramsey, Kenneth L.; Ward, Thomas G.; Elgar Partnership, WHF, Inc.; JDG, Inc.; LDG, Inc.; and Schildhause, Sol - Petition for Reconsideration - **Denied** - (February 27, 1991).

Sigmon, Jeffrey C. & Stewart, Steven C. - Petition for Reconsideration - **Denied** (March 8, 1991)

Sound Broadcasting, Inc. - Motion for Deferral of Hearing Fee for new FM station at Copeland, Kansas - **Motion rendered moot** - (February 25, 1991).

287 Monroe Communications, Inc. - Request for a Refund of a Hearing Fee for a new FM station at Monroe, Louisiana - **Granted** (March 11, 1991).

NOTE: ANY QUESTIONS REGARDING THIS REPORT SHOULD BE DIRECTED TO THE PREPARER, CLAUDETTE E. PRIDE, ACTING CHIEF, FEE SECTION ON 632-0241.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
April 5, 1991

Released: April 15, 1991

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Springtown Educational
Broadcasting Foundation
Radio Station KYQX(FM)
P. O. Box 1079
Springtown, TX 76082

Attention: Wesley Yeager, President

Dear Licensee:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On November 28, 1990, we asked for your comments concerning certain KYQX(FM) underwriting announcements alleged to have been aired on August 24 and September 8, 1989, and May 10 and October 12, 1990 (see attached transcripts). The announcements appeared to promote the sale of goods and services of for-profit entities, in possible violation of Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of our Rules.

In your December 12, 1990, response, you admit that these and other similar announcements probably aired on the dates alleged. You state that, not being represented by legal counsel at the time, you did not realize the announcements in question might violate our rules and policies governing underwriting announcements. You assert that, after receiving our letter, you took immediate steps to assure that KYQX(FM) underwriting announcements comply with such rules and policies.

Section 399B of the Communications Act prohibits noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for remuneration. Although contributors of funds may receive on-air acknowledgments, the Commission has stated that such acknowledgments may be made "for identification purposes only and should not promote the contributor's products, services, or company." Accordingly, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. *See Public Notice*, "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161, April 11, 1986.

The announcements in question appear to contain comparative or qualitative descriptions, calls to action, inducements to buy, or otherwise exceed the identification-only purpose of underwriting acknowledgments by generally promoting the sale of goods and/or services of for-profit entities. Thus, it appears that you have repeatedly violated Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of the Commission's Rules by broadcasting said advertisements.

We are not persuaded that your prior lack of familiarity with the governing rules and statutes should mitigate or excuse the violations. Licensees are expected to know and comply with the provisions of the Communications Act and Commission's rules and policies.

Accordingly, pursuant to Section 503(b) of the Communications Act, Springtown Educational Broadcasting Foundation, licensee of Station KYQX(FM), Weatherford, Texas, is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE in the amount of five thousand dollars ($5,000.00) for the apparent repeated violations of the aforementioned provisions on May 10 and October 12, 1990. (The statute of limitations bars a forfeiture for the advertisements aired on August 24 and September 8, 1989.) The amount specified was reached after careful consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart
Chief, Mass Media Bureau

ATTACHMENTS

KYQX (FM), Weatherford, TX 8/24/89 and 9/8/89

1. This check of sports underwritten by Don Bergman Insurance. As you buy your next car, Don Bergman can protect it with new mechanical breakdown insurance, the MBI-Plus Plan. You see, MBI Plus provides warranty coverage on your car and savings on the normal dealer price. Your MBI policy allows you 24-hour road service, convenient 24-hour toll free number and towing reimbursement should anything go wrong with your new car. The MBI Plus Plan covers up to 70 years or 75,000 miles and covers nearly all parts on most domestic and foreign cars. For more information, Don Bergman Insurance can be phoned by calling 594-7468. Don Bergman Insurance, located on the east side of the square in Weatherford.

2. Time for an FM-89 sports check and it's underwritten this hour through the support of The Pizza Place, located at 1218 South Main in Weatherford, featuring pizza, salads, lasagne and submarine sandwiches. The Pizza Place. Home of the Wednesday lunch special. All day long the lunch special going on at The Pizza Place on 1218 South Main in Weatherford, you can tell Roger that I sent you, Chuck Kelley, FM-89 sports.

3. A warranty with your new or used cars that just about bear (?) with the dealers. Get more information by calling Don Bergman Insurance, located on the east side of the square in Weatherford -- he supports Weatherford High School and Parker County athletics.

4. This Dallas Cowboys report is brought to you by Trinity Meadows located just minutes east of Weatherford, and they have already announced starting dates for the 1990 racing season. Trinity Meadows is right now preselling Jockey Club memberships with access to food, bar and live entertainment facilities at the newest racetrack and the only racetrack at the Metroplex that is available for licensed paramutual betting. That will be at Trinity Meadows racecourse just about 20 minutes from the Metroplex – there are 5 million people to draw from in Dallas/Ft. Worth so it might be a good idea to get your Jockey Club membership early. You can get it for up to three years or a lifetime membership if you like. The Jockey Club at Trinity Meadows racecourse in Weatherford.

5. McBride Automotive, your local bumper to bumper auto parts store wants to let you know their location, it's at 2404 Ft. Worth Highway, a couple miles east of town. But when you get there you'll find Fram air and oil filters, Whitener halogen headlights, Rock Hill shock absorbers by Gabriel and all types of basic maintenance items like Valvoline motor oil. You can also find the official 1989 bumper to bumper dirty hands T-shirt, on sale for a limited time only, with sizes for men and women. Limit 2 please at McBride Automotive, your bumper to bumper automotive store. Their address, oh yeah, 2404 Ft. Worth Highway, east of Weatherford, supporting Kangaroo football in '89.

6. Tehouse Real Estate, located at 1803 C Ft. Worth Highway, invites you to let them help you find the property of your choice. Tehouse and realtor Gail Kelly specializes in home, acreage, farm, lakelot or business properties. Her phone number 599-9404 locally, and 441-9613 in the Ft. Worth area. Whether you're just moving in or have lived in the Weatherford area for many, many years, Gail Kelly would like to hear from you. 599-9494 locally or 411-9613 to buy or sell. Tehouse Real Estate, 1803C Ft. Worth Highway, supporting WHS in 1989.

7. John Tehee and Larry Tidwell salute the 1989 Weatherford Kangaroo Football team and wish the Roos good luck throughout the season. John and Larry are co-owners of Weatherford Brake and Front End and Circle T Muffler Shops located at 206 Ft. Worth Street. Weatherford Brake and Front End specializes in full front end service alignments and repairs of all front end problems. While you're at Weatherford Brake and Front End you can stop by Circle T Muffler to get your exhaust system checked and fixed. Circle T Muffler and Weatherford Brake and Front End, home of the Kelly Springfield tire, open 8 to 6 Monday through Friday and 7 to 12 on Saturday.

8. Before you buy or renew your insurance you can call or come by for a free quote, Billy Caine Insurance, your Farmers Insurance agent. Phone 598-0034.

5/10/90

9. The seven o'clock news report is made possible through the support of Jerry's GM Transportation Center. They're located at 4100 Fort Worth Highway in Weatherford. Featuring a complete line of GM products including Chevy trucks. Jerry's GM Transportation Center is also the home of the North Texas Chevy 5000, where with every test drive you'll receive a pair of tickets to the May 15 Texas Rangers-Detroit Tigers baseball game. Serving the car and truck needs of Parker County for over 20 years, Jerry's GM Transportation Center.

10. . . . Weatherford Brake and Front End Shop and Circle T Muffler Shop, at . . . . Owners John Tehee and Larry Tidwell remind you that you can have your brakes and mufflers checked out at no charge. They also have Kelly tires and shock absorbers. Accepting Visa, Mastercard, and Discovery Card, Weatherford Brake and Front End Shop and Circle T Muffler Shop at 206 Fort Worth Street, Weatherford.

10/12/90

11. This weather was sponsored by Ben Combs Optical, 808 South Main. At Ben Combs Optical they sell prescriptions as well as duplicate lenses. With one hour service in many cases. Let their family serve your family. Call Ben or Vicky Combs at 599-8581.

12. This weather is sponsored by Quick Print on the southeast corner of the Square. Quick Print has a public FAX machine, 3 copiers so there's no waiting, and a work station for their customers. It's time to order Christmas cards for business or personal use. They have all styles and sizes. They're open 8:30 a.m. to 5:30 p.m. Monday through Friday. Quick Print on the Square in Weatherford. Give them a call at 594-8121.

13. . . . Brought to you by Edward D. Jones and Company Investments at 119 North Main Street in the Professional Building. We are going to be speaking with Kim who works for Kevin Mangum down there at Edward D. Jones. If you . . . have any questions or would like to make investments of any type, Edward D. Jones are the people to call at 599-8316. Kim, are you there . . .

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

QWEST MICROWAVE VII, INC. File No. I-T-C-90-168

Application for authority to establish channels of communications for service between the U.S. and Canada.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 29, 1991; Released: April 15, 1991

By the Chief, International Facilities Division:

1. The above-captioned application, filed on August 20, 1990 and supplemented on March 15, 1991, by Qwest Microwave VII, Inc. (Qwest VII), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between its microwave station at Buffalo, New York and the microwave station of CNCP Telecommunications (CNCP) at Port Erie, Ontario for the provision of direct service between the U.S. and Canada. The application was placed on public notice on September 5, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the public convenience and necessity require the provision of direct service to Canada.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-168 IS GRANTED, and Qwest VII is authorized to:

a. establish channels of communication between its microwave station at Buffalo, New York and the microwave station of CNCP at Port Erie, Ontario; and

b. use the facilities jointly with CNCP to provide private line service between the U.S. and Canada.

3. IT IS FURTHER ORDERED that in accordance with contract submitted between Qwest VII and CNCP, this authorization is limited to the provision of United States-Canada private line service only - that is, private lines which originate in the United States and terminate in Canada or which originate in Canada and terminate in the United States and such private lines shall not be interconnected with the public switched telephone network. Thus, any interconnection with facilities of connecting or local exchange companies is limited to the purpose of providing an end-to-end private line circuit, not interconnected with the public switched network.

4. IT IS FURTHER ORDERED that Qwest VII's request for authority *nunc pro tunc* is DENIED. Accordingly, this authorization is without prejudice to any further action the Commission might take with respect to Qwest VII's provision of international service without appropriate authorization.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between Qwest VII and its correspondent in Canada and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Phone America of Carolina, Inc. File No. I-T-C-91-061-TC

Application for authority pursuant to Section 214 of the Communications Act of 1934 for Transfer of Control of an international resale Certificate of Authority

MEMORANDUM, OPINION, AND ORDER

Adopted: April 5, 1991; Released: April 15, 1991

By the Chief, International Facilities Division:

1. On January 30, 1991, Phone America of Carolina, Inc. (Phone America) and LDDS Communications, Inc. (LDDS), filed an application requesting authority to transfer control of Phone America to LDDS. The application was put on public notice on February 27, 1991, and no comments were received.

2. Phone America operates as both a domestic and international nondominant resale common carrier. It provides switched international message telephone services (IMTS) between the United States and various international points by reselling the switched voice services of AT&T, MCI and US Sprint.[1] Phone America operates under the streamlined regulatory requirements established for non-dominant international carriers in *International Competitive Carrier Policies*.[2] The application states that Phone America is a North Carolina corporation. LDDS is a telecommunications holding company with several nondominant resale common carrier operating subsidiaries. LDDS is a Tennessee corporation. [3]

3. The application states that LDDS will purchase 100% of the outstanding stock of Phone America. Phone America will, for the immediate future, continue to remain in business at the same location, operate under the same name, and offer all services presently offered. The parties contemplate that significant economies will result from the acquisition and the additional management resources that LDDS will provide.

4. In view of the foregoing, we conclude that the transfer control of Phone America to LDDS will serve the public interest. It will permit Phone America to continue to provide services uninterrupted, and to operate effectively and efficiently. We note that after the proposed transfer of control, Phone America will continue to be subject to streamlined regulatory requirements for nondominant international telecommunications carriers.

5. Accordingly, IT IS ORDERED that the application of Phone America of Carolina, Inc. and LDDS Communications, Inc., File No. I-T-C-91-061-TC, IS GRANTED and we consent to the transfer of control from Phone America of Carolina, Inc., which holds the Section 214 authorization originally granted in File No. I-T-C-87-173 (*see* n.1), to LDDS Communications, Inc.

6. IT IS FURTHER ORDERED that Phone America must continue to maintain tariffs pursuant to Section 203 of the Communications Act of 1934, as amended, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. IT IS FURTHER ORDERED that Phone America must file annual reports of oversea telecommunications traffic as required by Section 43.61 of the Commission's Rules, 47 C.F.R. § 43.61 (October 1, 1990).

8. IT IS FURTHER ORDERED that Phone America is limited, under this order, to the provision of international switched voice services by the resale of the international switched voice services set forth in AT&T Communications Tariff F.C.C. Nos. 1 and 2, MCI Tariff F.C.C. No. 1, and US Sprint Tariff F.C.C. Nos. 1 and 2 between the U.S. and those points listed in the aforementioned tariffs in accordance with Phone America's previous authorization in File No. I-T-C-87-173 (*see* n.1).

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Phone America of Carolina, Inc., 2 FCC Rcd 6746 (1987).

[2] International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 RR 2d 1435 (1986) (hereinafter *International Competitive Carrier Policies)*.

[3] LDDS has stated that it is not directly or indirectly controlled by aliens or a foreign telecommunications entity; nor is any principal shareholder of LDDS an alien. LDDS has also stated that none of its directors are aliens or employees, agents, or representatives of foreign telecommunications entities. *See* Telamarketing Corporation of Louisiana, 5 FCC Rcd 7263 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-503

In re Applications of

NUGGET BROADCASTING COMPANY	File No. BPH-890728MD
GEORGIA MOUNTAINS COMMUNICATIONS, INC.	File No. BPH-890728ME
KEVIN C. CROOM	File No. BPH-890728MG

For Construction Permit for
New FM Station, Channel 282A,
Dahlonega, Georgia

MEMORANDUM OPINION AND ORDER

Adopted: April 4, 1991; Released: April 18, 1991

By the Review Board: MARINO (Chairman) and ESBENSEN.

Board Member BLUMENTHAL absent.

1. By *Order*, FCC 91M-282, released March 5, 1991, Administrative Law Judge Edward Luton (ALJ), in response to a Motion to Dismiss filed by Nugget Broadcasting Company (Nugget), dismissed the application of Georgia Mountains Communications, Inc. (Georgia Mountains) from this proceeding for its purported failure to comply with 47 CFR § 1.221(c) (timely filing of notices of appearance in hearing proceedings). In so doing, the ALJ observed that the last date for filing such notices of appearance was December 24, 1990 (extended to December 26, 1990 due to intervening circumstances discussed, *infra*). However, in apparent reliance upon information submitted by Nugget, the ALJ determined that "the date stamp of the Commission's Secretary confirms that Georgia Mountains' Notice of Appearance was not filed with the Commission until January 2, 1991."

2. In its Appeal, filed pursuant to 47 CFR § 1.301(a), Georgia Mountains claims that: (1) the ALJ declared that Notices of Appearance for all parties were originally due on December 24, 1990; (2) because of the Christmas holiday, the U.S. Government elected to allow early release of all its employees on December 24, 1990, and the Commission issued a *Public Notice*, Mimeo 11087, released December 20, 1990, which declared that: "All filings due December 24, 1990, will be accepted the next official work day" (*i.e.*, December 26, 1990, the day subsequent to Christmas Day);[1] (3) pursuant to 47 CFR §§ 1.221(e) and (f), and the Commission's *Memorandum Opinion and Order In the Matter of Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989*, 5 FCC Rcd 3558 (1990), it was required to file its Notice of Appearance and requisite filing fee of $6,760, *see id.*, at 3597, directly with the Mellon Bank, a Treasury Department lockbox bank in Pittsburgh, Pennsylvania, *id.*, at 3560, accompanied by FCC Form 155. *Id.*, at 3568; *see also* 47 CFR § 1.1104 (fee must accompany Notice of Appearance filed pursuant to Section 1.221). Attached to Georgia Mountains' Appeal (at Exh. C) is a copy of counsel's transmittal letter to the Mellon Bank which bears the following stamp: "FCC/MELLON DEC 26 1990." The transmittal letter also includes a copy of FCC Form 155, and a copy of the applicant's check in the amount of $6,760, both originally attached thereto.

3. We will grant the appeal. Although Nugget relies on a Commission "Docket Sheet" notation to argue that Georgia Mountains' Notice of Appearance was not filed until January 2, 1991, and, based thereon, claims that Georgia Mountains' submission was not filed with the Commission in Pittsburgh until that date, its position is belied by the clear and unmistakable contemporaneous date stamp officially affixed by the Mellon Bank in Pittsburgh to the transmittal letter accompanying the fee payment on December 26, 1990. [2] In light of this persuasive evidence of filing in Pittsburgh, which comports with Commission procedures set out at para. 2, *supra*, we hold that Georgia Mountains has completely complied with 47 CFR § 1.221, and the amended provisions of the Commission's Rules contained in 47 CFR Parts 0, and 1, as implemented by the " *Establishment of a Fee Collection Program* " *Memorandum Opinion and Order, supra,* and that its Notice of Appearance and requisite filing fee, and FCC Form 155 were, in fact, timely and properly filed.

4. ACCORDINGLY, IT IS ORDERED, That the Appeal of Georgia Mountains Communications, Inc., filed March 11, 1991, IS GRANTED, and that its application IS REINSTATED in the captioned proceeding.[3]

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] By *News Release*, Mimeo 11095, released December 21, 1990, the Commission indicated that it would be closed on Christmas Day. Neither the ALJ nor any of the parties now dispute that December 26, 1990 was the last day for filing Notices of Appearance in this proceeding. However, we are also constrained to observe that Georgia Mountains could have filed with the Mellon Bank as late as midnight on December 27, 1990 by following new procedures subsequently adopted by *Public Notice*, Mimeo 3085, released May 9, 1990, by utilizing USPS Express Mail or "an established courier service." More specifically, this *Public Notice* declares that:

> For time critical, feeable broadcast and common carrier applications, heretofore filed in Washington, D.C., the Commission will accept as timely filed those applications stamped in by the lockbox bank (Mellon Bank in Pitts-

burgh, PA) before 12 o'clock midnight on the next business day following the *official* deadline or cut-off date established by the Commission.

For example, if the Commission establishes a deadline date of May 16, all filings received at the Mellon Bank in Pittsburgh, PA before 12 o'clock midnight on May 17, will be considered as timely filed.

The Commission has not officially extended any deadline or cut-off dates it has established. It has, however, by applying a "mail box" rule, granted filers who are required to file in Pittsburgh one extra business day for transportation.

Applicants do not have to take any additional action to avail themselves of this one extra busines day. It is automatically granted.

[2] Nugget now seeks to argue that Georgia Mountains never explained or demonstrated prior to the filing of its Appeal the existence of the date stamp on the transmittal letter. However, when Georgia Mountains filed its opposition to Nugget's Motion to Dismiss, it in fact addressed Nugget's then-sole argument that the due date was December 24, 1990 and clearly conceded that it did not file its Notice of Appearance until December 26, 1990. *See Opposition,* filed January 16, 1991, at para. 1.

[3] In light of the time constraints here present, the ALJ and the parties are being furnished pre-publication copies of this document.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-207

In re Applications of

RADIO REPRESENTATIVES, INC.	File No. BPH-880620MB
TRAPPER/COLE RADIO, INC.	File No. BPH-880623ML
CABALLERO SPANISH MEDIA, INC.	File No. BPH-880623MM
IRENE ESCALANTE	File No. BPH-880623MO

For Construction Permit for
New FM Station, Channel 239B1,
Orcutt, California

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1991; Released: April 18, 1991

By the Review Board: MARINO (Chairman) and ESBENSEN.

Board Member BLUMENTHAL absent.

1. On January 25, 1991, Irene Escalante (Escalante) appealed a ruling by Administrative Law Judge John M. Frysiak (ALJ), dismissing her application from this proceeding. *See Memorandum Opinion and Order*, FCC 91M-04, released January 4, 1991. Essentially, the appeal raises the narrow question whether an applicant, which certified that it was not financially qualified (and consequently was faced with a financial qualifications issue), is required to file a curative amendment prior to hearing, accompanied by a showing of good cause, to prosecute its application further. Recent Commission precedent fully supports the ALJ's action that such an amendment is a condition precedent to further prosecution of an application; and thus, we deny the appeal. A companion appeal, filed February 25, 1991, by Escalante from a subsequent ruling by the ALJ, denying her intervention and continued participation in the case, will also be denied. *See Memorandum Opinion and Order*, FCC 91M-504, released February 8, 1991.

BACKGROUND

2. The ALJ issued his *Order*, *supra*, dismissing Escalante's application, three weeks prior to the scheduled commencement of hearing, on motion of competing applicant, Radio Representatives, Inc. (RRI). The dismissal was predicated on Escalante's continuing failure over a seven-month period following the release of the *Hearing Designation Order*, 5 FCC Rcd 3064 (1990) (*HDO*), to amend her application to show that she was financially qualified. The ALJ observed that Escalante's lengthy delay, continuing up to the start of the hearing itself, to establish her financial qualifications, was "inexcusable." Escalante disputes that she never filed an amendment, charging that the ALJ "apparently forgot" her so-called proffered "amendment" of November 5, 1990 (filed some five and a half months after release of the *HDO*); and she asserts that she was prepared to demonstrate her financial qualifications at the hearing on the designated issue. Escalante's alleged November 5 financial amendment consisted merely of disclosure of "(1) the procurement of Ms. Escalante's new transmitter site, and (2) the *pro forma* restructuring of the applicant." Escalante's Petition for Leave to Amend, filed November 5, 1990, at 1. Accompanying this material was a revised financial certification (consisting of FCC Form 301, Section III with the affirmative ("yes") certification box checked) claiming that the applicant was now financially qualified. However, such a bare certification is unacceptable. *See South Florida Broadcasting Co., Inc.*, 94 FCC 2d 452, 454-456 (1983) (once issue is raised, applicant must make traditional financial showing with supporting documentation).

DISCUSSION

3. The ALJ was well within his discretion in dismissing Escalante's application. Seven months had elapsed since the release of the *HDO* and the applicant had still not amended her application to demonstrate her financial qualifications. In fact, in *Aspen FM, Inc.*, FCC 91-68, released March 21, 1991, the Commission held "it was error" for an ALJ at hearing to accept into evidence a new financial proposal in the absence of a petition filed pursuant to 47 CFR § 73.3522(b), demonstrating the following "good cause" elements: (1) due diligence; (2) involuntariness; (3) no modification or addition of issues or parties needed; (4) no disruption to hearing or need for additional hearing; (5) no unfair prejudice to other parties; and (6) no competitive advantage gained. *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970)). Moreover, the Commission explicitly rejected the argument, implicitly made here, that applicants can freely amend their financial proposals during the hearing in response to financial issues specified against them. It explained that such a policy (once followed, but abandoned with the 1981 adoption of the certification procedure) is inconsistent with its objective of stabilizing applicants' proposals at the beginning of a proceeding, and would disrupt and delay hearing proceedings in conflict with its goal of expeditiously providing new services to the public. *See also Edwin A. Bernstein*, 5 FCC Rcd 2843 (1990) at n. 1 (rejecting argument that amendment is not a condition precedent to prosecution of an application), *aff'd by judgment sub nom. Virginia Lefebvre v. FCC*, No. 90-1284 (D.C. Cir. March 8, 1991); *Sharron Annette Haley*, FCC 91R-25, released March 19, 1991 (Rev. Bd.) (dismissing application after hearing where applicant never filed amendment to change her original financial certification from "no" to "yes," or demonstrated good cause for acceptance of financial amendment). Since no amendment, supported by good cause, was ever tendered or accepted, Escalante is left with her certified representation that she is not financially qualified. That is ample grounds for the

ALJ's dismissal of her application. *Chudy Broadcasting Corp.*, 58 RR 2d 133, 135 (1985); *see also Carol Sue Bowen*, 6 FCC Rcd 10, 11 (Rev. Bd. 1991).

4. Finally, Escalante's appeal from the ALJ's denial of her petition for intervention in this proceeding is moot, in view of the ALJ's recent termination of the proceeding. *Memorandum Opinion and Order*, FCC 91M-920, released March 13, 1991. However, even had the proceeding not been terminated, "it is well established that former applicants, without more, cannot qualify as parties in interest," as that term is used in 47 CFR § 1.223, governing petitions to intervene. *Denton FM Radio, Ltd.*, 56 RR 2d 171, 172 (Rev. Bd. 1984). The ALJ's *Order* denying intervention noted that, although Escalante was interested in participating with respect to certain allegations against RRI, including a tax conviction against one of RRI's principals, she never supplied any facts, nor established how her participation would assist the Commission, as required by 47 CFR § 1.223(b).

5. Moreover, the tax conviction is an issue currently *sub judice* in another FM proceeding (MM Docket No. 90-84, Honolulu, Hawaii); and the ALJ here, in terminating the proceeding and granting RRI's application, conditioned, on suggestion of the Mass Media Bureau, the grant of RRI's application to whatever action the Commission deems appropriate in light of the outcome of the Honolulu proceeding. Finally, the ALJ, in denying intervention, also alerted Escalante that she could turn over to the Bureau whatever information she may possess regarding RRI's basic qualifications. That was sufficient. *See generally GAF Broadcasting Co., Inc.*, 94 FCC 2d 203, 204 (Rev. Bd. 1983); *see also East Hampton Broadcasting Co., Inc.*, FCC 84R-65, released September 20, 1984 (Bureau continues to monitor information coming to its attention that may reflect on an applicant's qualifications to be a Commission licensee and transmits such information to the ALJ and the parties).

6. ACCORDINGLY, IT IS ORDERED, That the Appeals filed January 25, 1991 (as supplemented February 5, 1991), and February 25, 1991, respectively, by Irene Escalante ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-72

In the Matter of

Amendment of Part 90 of the Commission's Rules to Create the Emergency Medical Radio Service — RM-7336

NOTICE OF PROPOSED RULE MAKING

Adopted: March 20, 1991; Released: April 16, 1991

By the Commission:

I. INTRODUCTION

1. The International Municipal Signal Association (IMSA) and the International Association of Fire Chiefs, Inc. (IAFC) have petitioned this Commission to amend our rules to establish a new Emergency Medical Radio Service (EMRS) as a Public Safety Radio Service under Subpart B of Part 90 of our Rules.[1] The petitioners ask us to limit eligibility in the EMRS to persons or entities engaged in the provision of basic or advanced life support. IMSA/IAFC request us to assign certain frequencies derived primarily from the Special Emergency Radio Service (SERS) to the EMRS and to amend our rules to enhance the utility of the proposed EMRS frequency assignments.

2. The public interest would be well-served by measures designed to improve the communications capabilities of entities engaged in the provision of life support activities. Accordingly, we have decided to issue this *Notice of Proposed Rule Making* to solicit comment on a proposal to assign specific frequencies for use in a new Emergency Medical Radio Service. We also propose certain policies and rules intended to promote more efficient and effective licensing of private land mobile radio users engaged in life support activities.

II. BACKGROUND

3. Emergency medical service (EMS) communications are those related to the actual delivery or rendition of emergency medical treatment.[2] Generally speaking, this includes the transmission of information between rescuers at the scene of an accident or disaster and physicians at a base station hospital.[3] In addition, emergency medical communications encompass the dispatch and coordination of emergency medical providers engaged in the transportation of injured persons to hospitals and trauma centers.[4] Under our current rules, entities engaged in the rendition of emergency medical care are ordinarily licensed in the Special Emergency Radio Service (SERS). Frequencies in the SERS are shared by the following ten categories of eligible users: medical services, rescue organizations, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, establishments in isolated places, communications stand-by facilities and emergency repair of public communications.[5] Emergency medical service communications are generally encompassed in the broader category of medical services within the SERS. This category is shared among certain hospitals, institutions and organizations regularly engaged in providing medical services, ambulance companies engaged in providing medical ambulance services, rescue organizations for the limited purpose of providing medical services, physicians, schools of medicine, oral surgeons and associations thereof, governmental entities for their own medical activities, and governmental entities for the provision of medical services to the public.[6]

4. Depending on the particular nature of the eligible entity, EMS providers may also have access to spectrum in various services such as the Fire Radio Service or the Local Government Radio Service, both of which are Public Safety Radio Services, or the rescue organization category within the SERS. Also, in addition to the spectrum available to them as SERS eligibles, licensees in the medical services category are given access to fifteen channels reserved for their exclusive use. Specifically, ten paired UHF frequencies in the 460 MHz range known as the MED channels are available on a primary basis for specific types of medical communications, the majority of which involve emergency situations.[7] All other medical service transmissions permitted on these channels may be performed on a secondary basis only.[8] Five VHF simplex frequencies in the 155 MHz range are also reserved for eligible users in the medical services category.[9]

III. PETITION FOR RULE MAKING

5. IMSA/IAFC and several commenters in this proceeding contend that the above scheme fails to satisfy the communications requirements of EMS entities.[10] Specifically, IMSA/IAFC maintain that the rapid increase in the number of EMS and SERS transmissions has overburdened the available spectrum, hindering the quality and reliability of EMS communications to an extent that poses a threat to human life and safety.[11] IMSA/IAFC suggest that the overcrowding in the SERS band is likely to worsen in the future, citing figures indicating that the demand for EMS channels is expected to increase by 245 percent nationwide between the years 1980 and 2000. Meanwhile, the petitioners contend, an anticipated forty percent decrease in the number of hospitals in the next ten years will place additional strain on the use of EMS frequencies as the importance of pre-hospital emergency care becomes increasingly crucial.[12]

6. IMSA/IAFC maintain that the congestion and interference plaguing EMS providers necessitate the assignment of spectrum to be used exclusively in the rendition of emergency medical care. Accordingly, IMSA/IAFC request us to establish a separate Emergency Medical Radio Service encompassing the emergency medical communications transmitted by licensees in each of the various categories under our current regulatory arrangement. IMSA/IAFC suggest that the new EMRS be placed in Subpart B of our Rules, the Public Safety Radio Services, rather than the SERS because classification in the Public Safety category would permit EMRS licensees access to the Public Safety UHF assignments, providing spectrum relief for some EMRS eligibles and improving spectrum

utilization overall.[13] Significantly, however, IMSA/IAFC request that EMRS licensees be permitted to retain their eligibility for SERS frequencies in order to ensure system-wide interoperability and to preserve designated mutual aid assignments.[14] To restrict the number of EMRS licensees in the manner necessary to prevent overcrowding, IMSA/IAFC ask us to adopt rules limiting eligibility in the EMRS to those entities engaged in communications related to the actual delivery or rendition of emergency medical treatment, specifically, the provision of basic or advanced life support.[15]

7. Under the IMSA/IAFC proposal, spectrum for the EMRS would be derived primarily from the SERS. Specifically, IMSA/IAFC suggest that the ten MED channels and the frequencies 155.325, 155.340, 155.355, 155.385 and 155.400 MHz be reassigned for use by licensees in the EMRS.[16] IMSA/IAFC also suggest that the following frequencies be reassigned from the SERS to the EMRS and that certain limitations currently governing the use of these frequencies be removed. Specifically, the petitioners request that the low power assignments 150.775 MHz and 150.790 MHz be moved to the EMRS and converted to full power assignments.[17] In suggesting this rule change, IMSA/IAFC contend that many current low power licensees are likely to seek an increase in output power to accommodate full power voice and telemetry as opposed to paging requirements.[18] Similarly, IMSA/IAFC request that the frequency pairs 460./465.525 and 460./465.550 MHz be moved to the EMRS and that 47 C.F.R. § 90.53(b)(34), which restricts access to these frequencies to local government eligibles, be eliminated.[19] Finally in this connection, IMSA/IAFC request the removal of the limitations currently applicable to 458.025/.075/.125/.175 MHz, and 453.025/.075/.125/.175 MHz frequencies,[20] and suggest that these frequencies be used to create four additional full-capacity UHF channel pairs for EMRS use.

8. The petitioners also request us to assign ten paired 220 MHz narrowband frequencies for the purpose of creating a spectrum resource designed to satisfy the future needs of the EMRS. According to IMSA/IAFC, narrowband assignments at 220 MHz are particulary appropriate for this purpose because the Commission recently proposed that ten of these frequencies be set aside for a similar service, the Personal Emergency Locator Transmitter Service (PELTS).[21]

9. Approximately 88 parties filed comments in response to the petition, all but one of whom applaud the overall proposal.[22] Commenters favoring the proposal unanimously agree that the establishment of a discrete EMRS is necessary to redress the congestion and interference impeding the effective transmission of EMS communications.[23] However, several commenters express concern with respect to various aspects of the scheme proposed by IMSA/IAFC. For example, the State of California Emergency Medical Services Authority (SCEMSA) suggests that the proposed eligibility criteria are too broad and will allow entities that do not regularly provide EMS care to become licensed in the EMRS.[24] In addition, the National Association of Business and Educational Radio, Inc., (NABER) disagrees with IMSA/IAFC's proposal to permit EMRS eligibles to remain eligible for SERS frequencies. NABER suggests that EMRS eligibles currently operating on SERS spectrum be grandfathered indefinitely for their existing authorizations but that the remaining SERS frequencies be limited to use by non-EMRS licensees.[25] Other commenters express opposition to the various changes in frequency use limitations proposed by IMSA/IAFC.[26] Only ProNet opposes the petition in its entirety, contending primarily that the proposed rule changes will adversely affect private carrier paging operations currently permitted on the SERS frequencies.[27]

IV. PROPOSAL/DISCUSSION

10. Throughout the development of the Special Emergency Radio Service, the Commission has attempted to safeguard the particular needs of licensees engaged in the provision of emergency medical care. We are especially sensitive to the need for protecting life saving communications from the use of SERS frequencies for other purposes. Although the designation of the MED channels and medical VHF frequencies was a significant accomplishment in this regard, the number of transmissions conducted on these frequencies has grown to an extent requiring that additional measures be taken to protect EMS communications. In recognition of this fact and independent of the petition filed by IMSA/IAFC, Congress has encouraged the Commission to study the availability of radio channels for emergency medical service communications and to establish a plan to ensure that the spectrum needs of entities engaged in the provision of emergency medical care are adequately provided for in the allocation of frequencies. Our evaluation of the effectiveness of the existing scheme governing EMS communications and our analysis of the record compiled in this proceeding persuade us that the establishment of an insular EMRS would serve as an important additional step toward redressing the conditions frustrating the reliability of EMS transmissions. Nevertheless, we wish to underscore our awareness that such action is likely to provide only modest relief from the problems identified in the IMSA/IAFC petition. To a large extent, we believe the crowding of EMS spectrum results from the volume of EMS transmissions rather than from the use of the applicable frequencies by incompatible non-EMS licensees. The establishment of a discrete EMRS will help to diminish those problems caused by the latter without the allocation of additional private land mobile spectrum. Congestion resulting from EMS transmissions, however, will be alleviated only if the various eligible entities are committed to meaningful coordination and to the development of innovative and efficient technologies. Mindful of this limitation, we have focussed on the following two broad objectives in attempting to devise an effective Emergency Medical Radio Service: (1) to replace the currently fragmented structure of EMS communications with a comprehensive, unified scheme; and (2) to ensure that spectrum assigned to the EMRS will be used in an effective and efficient manner. We now discuss each aspect of our proposal in detail.

11. Initially, we believe that the most suitable location for the EMRS is in Subpart B of Part 90 of our Rules. We have previously recognized that the safety of life and property aspects of the Public Safety Radio Services and EMS entities licensed in the SERS make these two groups uniquely compatible.[28] Furthermore, communications transmitted by Public Safety Radio Service licensees and EMS providers commonly relate directly to the imminent safety of life. By contrast, the communications of licensees in the non-EMS SERS categories, while often indirectly related to life-saving activities, are not ordinarily of this same critical nature. Consequently, placing the EMRS in

Subpart B is consistent with our scheme differentiating the Special Emergency and Public Safety Radio Services. In addition, inclusion of the EMRS in Subpart B will benefit EMRS licensees because it will allow them access to certain UHF assignments at 453.050 to 453.950 MHz on a shared basis with other Public Safety Radio Service licensees, providing an additional source of spectrum.[29] Commenters are encouraged to address all aspects of this proposal and to suggest alternative plans for the location of the EMRS.

12. Under our proposal, EMRS entities will retain their eligibility in the SERS. This is necessary because many entities engaged in the provision of emergency medical care are either also responsible for providing services requiring the use of SERS frequencies or must be able to interface directly with other entities having this responsibility.[30] Moreover, as mentioned in the IMSA/IAFC petition, several state and local public safety plans have designated low-band SERS frequencies as mutual aid assignments, particularly in rural areas. We agree with IMSA/IAFC that EMRS licensees must have continuing access to such SERS spectrum.[31] For this reason, we are inclined to disagree with NABER's proposal that existing EMRS eligibles operating on SERS frequencies be grandfathered throughout their present authorizations, but that further eligibility in the SERS be limited to entities ineligible in the EMRS.[32] Furthermore, eligible users in the EMRS will likely have non-emergency communications needs, such as administrative communications, that must be satisfied on spectrum other than that assigned to the EMRS. SERS frequencies are the logical source for the fulfilment of these requirements because communications of this nature are currently permitted on SERS spectrum. We do, however, invite comment on this aspect of our proposal.

13. A crucial component of an effective EMRS is a properly tailored eligibility restriction. By circumscribing eligibility, the number of users will be kept to a minimum, limiting the problems attendant with overcrowding to the greatest possible extent. Accordingly, we propose to limit eligibility in the EMRS to persons or entities that provide basic or advanced life support services on an ongoing basis for the transmission of communications essential to the delivery of emergency medical services. In addition, we propose to require applications for licensing in the EMRS submitted by persons or organizations other than governmental entities to be accompanied by a statement prepared by the governmental body having legal jurisdiction over the area to be served indicating that the applicant is included in the state's emergency plan or otherwise supporting the application.[33]

14. In their comments, APCO and SCEMSA express the concern that the eligibility restriction suggested by IMSA/IAFC, which is nearly identical to that set forth above, is not sufficiently restrictive and may allow a potentially unlimited number of entities engaged only tangentially in the provision of emergency medical services to become licensed in the EMRS.[34] In our view, the proposed restriction limiting eligibility in the EMRS to entities that provide basic or advanced life support services on an ongoing basis adequately responds to this concern. We do, however, request commenters to address the sufficiency of this restriction. We also request commenters to discuss the anticipated effectiveness of our proposal to permit non-government entities to establish eligibility by providing official verification, as well as note any difficulties in obtaining the necessary statement from local authorities as required in the existing rules governing the Fire and Forestry-Conservation Radio Services.

15. Consistent with the goal of restricting the use of EMRS frequencies, we also propose to amend 47 C.F.R. § 90.176(a) to prohibit non-EMRS SERS licensees from having access to EMRS spectrum through interservice sharing.[35] Currently, Section 90.176 is divided into two categories of private land mobile radio service users. The first category includes eligibles in the Public Safety Radio Services and government eligibles in the Special Emergency Radio Service;[36] the second category includes non-government eligibles in the SERS and all other eligibles in the Industrial and Land Transportation Radio Services, with the exception of the Radiolocation Service.[37] Generally, within these categories, Section 90.176 permits the applicable group of SERS licensees to share the frequencies allocated to the Public Safety or Industrial and Land Transportation Radio Services, as the case may be, but does not permit licensees in these other radio services to share SERS frequencies.[38] Under our proposal, the first of these two categories, which presently encompasses the Public Safety Radio Service and governmental licensees in the SERS, will be amended to permit sharing of frequencies allocated to the Public Safety Radio Services only by the various separate services contained in Subpart B.[39] In addition, we propose to amend Section 90.176(b) to allow all non-EMS SERS eligibles as opposed to only non-governmental SERS entities, to share frequencies allocated to the Industrial and Land Transportation Radio Services.[40] Moreover, because the removal of EMS communications from the SERS eviscerates the need for exempting SERS frequencies from interservice sharing, we also propose to amend Section 90.176(b) to permit Industrial and Land Transportation Radio Service eligibles to share SERS spectrum under this rule.[41]

16. We agree with IMSA/IAFC that the SERS spectrum limited primarily for EMS communications is the most appropriate source of spectrum for the EMRS. Accordingly, we propose to assign the ten MED channels[42] and the five VHF simplex frequencies 155.325, 155.340, 155.355, 155.385 and 155.400 MHz for EMRS use. These frequencies are particularly suitable for the EMRS because they are currently designated for emergency medical communications and because the current limitations on their use make their removal least disruptive to the remaining SERS licensees. A service category that may, however, be disrupted by the reassignment of these frequencies is that comprised of the remaining non-EMRS medical services licensees operating on the MED channels.[43] Although these entities have access to SERS spectrum aside from the MED frequencies, we solicit comment as to whether additional measures are necessary to accommodate their communications needs.

17. The reassignment of the above-mentioned frequencies from the SERS to the EMRS will necessitate the amendment of 47 C.F.R. § 90.53(b) to delete all references to this spectrum. These changes are reflected in the attached Appendix A. In addition, IMSA/IAFC suggest that several restrictions currently applicable to these frequencies need not be retained in the EMRS. For example, the petitioners suggest that 47 C.F.R. § 90.53(b)(9), which restricts assignment of the frequencies 155.325, 155.355, 155.385 and 155.400 MHz to hospitals and ambulance companies in communication with hospitals, and 47 C.F.R. § 90.53(b)(10), which limits the authorized use of

the frequency 155.340 MHz to "the rendition and delivery of medical services," would be superseded by the proposed eligibility rules for the EMRS. We agree. These sections would not be apropriate in the EMRS, which will have its own narrow eligibility and use restrictions. Accordingly, we propose not to retain these limitations.

18. We are given greater pause, however, by IMSA/IAFC's suggestion that the limitations contained in 47 C.F.R. §§ 90.53(b)(16), (19) and (20) need not be retained in the EMRS. These limitations define specific permissible primary uses of the MED channels and are not necessarily supplanted by the proposed EMRS eligibility rules. For example, Section 90.53(b)(16) restricts the primary use of MED channels 9 and 10 to the dispatch of medical care vehicles and personnel. Similarly, Section 90.53(b)(19) restricts the primary use of MED channels 1, 2 and 3 to biomedical telemetry. Likewise, Section 90.53(b)(20) restricts the primary use of MED channels 4, 5, 6, 7 and 8 to communications between medical facilities vehicles and personnel related to medical supervision and instruction for the treatment and transport of patients in the rendition or delivery of medical services. IMSA/IAFC suggest that the removal of these limitations is desirable because this would allow non-voice operations to be conducted on a primary or co-primary basis with voice operations, subject only to frequency coordination.[44] Although we recognize that the removal of the restrictions governing the primary use of the MED channels would foster increased flexibility in the use of these frequencies, we note that the use restrictions were devised in response to studies and recommendations prepared by entities engaged in the provision of emergency medical care.[45] The specific limitations were designed to promote efficiency and compatibility while at the same time permitting the necessary flexibility by authorizing both primary and secondary uses. Because these objectives will continue to be served by the retention of standards governing the use of these frequencies after they have been assigned to the EMRS, we propose to leave our existing primary use restrictions intact.[46] The removal of EMS communications from the SERS will sufficiently expand capacity for secondary use to permit EMS entities to mix and match the use of the available frequencies as their systems and equipment limitations dictate. We request commenters to address this aspect of our proposal and to submit alternative restrictions and guidelines designed to maximize effective use of EMRS spectrum.[47]

19. As indicated, IMSA/IAFC request that certain additional frequencies be reassigned from the SERS to the EMRS, and that the restrictions currently applicable to these frequencies be removed. Those commenters addressing the issue agree that the assignment of additional spectrum for EMRS use will serve the public interest.[48] We have carefully reviewed the record in an attempt to ascertain the best source for such additional EMRS spectrum. We agree with the petitioners that the reassignment of the SERS frequencies 453.025/.075/.125 and .175 MHz and 458.025/.075/.125 and .175 MHz would result in the least disruption to the remaining non-EMRS SERS entities and would be particularly appropriate for EMRS use because it will create four new full capacity UHF frequency pairs. Significantly, in suggesting the assignment of these frequencies to the EMRS, IMSA/IAFC underscore that these channel pairs are in the same band as the MED channels, making them compatible with existing multichannel mobile equipment.[49] This compatibility will promote system expansion and enable existing mutual aid assignments to be retained.[50]

20. The 453 MHz frequencies 453.025/.075/.125/.175 are currently restricted to one-way paging operations for entities eligible in the medical services category of the SERS.[51] ProNet opposes the proposed reassignment of these frequencies, contending that any forced migration of medical paging operations will disrupt important medical communications and will subject medical paging licensees to significant economic costs.[52] We are sympathetic to the fact that non-EMRS licensees with existing systems operating on the frequencies at issue will incur some economic disadvantages as the result of the reassignment of this spectrum. We believe, however, that the need for satisfying the communications demands of entities engaged in life saving activities is of paramount concern. Moreover, it is our belief that the demand for paging operations presently conducted on these frequencies can be accommodated on other paging-only assignments, which are generally not congested.[53] We do, however, request commenters to submit their views with respect to the adequacy of using remaining paging frequencies in the SERS to absorb operations dislocated by the action proposed herein. The proposed use of the 453 MHz frequencies in the EMRS for two-way voice and telemetry communications is not particularly compatible with the current paging operations. Grandfathering these operations indefinitely, as suggested by the petitioners, may not, therefore, be appropriate. Accordingly, we propose to grandfather existing one-way paging operations on these frequencies for a period of five years after the date of the adoption of the proposals set forth herein. Upon the expiration of this five year period, existing paging operations must be relocated to other SERS paging-only frequencies listed in Section 90.53(b) of our Rules, 47 C.F.R. § 90.53(b).[54] We request commenters to discuss all aspects of this proposal. In particular, we seek commenters' views with respect to whether a five-year grandfathering period allows a sufficient amount of time to permit affected entities to relocate their operations. We also request commenters to discuss whether we should permit EMRS eligibles to conduct one-way paging on these frequencies after the expiration of the applicable five year period despite the designation of these frequencies for two-way communications.

21. We also believe that adequate spectrum resources exist to absorb SERS licensees displaced from the reassignment of the 458 MHz frequencies listed above. Under our existing rules, these frequencies are limited to use by licensees in the medical services category for telemetry or voice transmissions with a maximum output power of 1 watt from a portable telemetering unit to a mobile repeater in an ambulance for automatic retransmission to a hospital or other medical care facility.[55] Low power portable transmitters currently operating on these frequencies may be accommodated on the 12.5 kHz frequency offset channels in the 450 MHz band pursuant to Section 90.267 of our Rules, 47 C.F.R. § 90.267. The offset frequencies are generally available to satisfy certain low power communications needs of private land mobile radio service licensees.[56] Although the nature of the 12.5 kHz offset channels subjects licensees operating on these frequencies to certain restrictions,[57] most of the low power operations conducted on the 458 MHz SERS spectrum at issue here are fully compatible with

these limitations.[58] We do, however, seek commenters' views on the suitability of the offset channels for the operations currently permitted on the subject 458 MHz frequencies. Further, we are concerned that high power operation on the 458 MHz frequencies may create adjacent channel interference. We request commenters to address this potential problem and to advance suggestions for its resolution.

22. We also propose to assign the low power SERS frequencies 150.775 MHz and 150.790 MHz to the EMRS for full power use. The restriction governing the use of these frequencies, which limits operations to voice transmission from a portable (hand-held) unit that is not airborne to an ambulance or other emergency vehicle for automatic retransmission on a regular mobile frequency to a base station facility,[59] implies that most existing licensees will be EMRS eligibles. Accordingly, we see little difficulty with the reassignment of these frequencies to the EMRS. Moreover, in imposing the 2.5 watt power limitation applicable to these frequencies, we stated that transmissions of this nature were consistently limited in the Land Mobile Services to 2.5 watts and concluded that the rules governing the use of the 150.775 and 150.790 MHz frequencies should be consistent with our prior practice.[60] In the EMRS, these frequencies would not be limited to this type of operation. Hence, the basis for the power limitation would no longer be valid. Again, however, we request commenters to address the potential for high power operation on these frequencies to cause interference to users on adjacent channels.

23. Likewise, we believe that the 460./465.525 and 460./465.550 MHz frequency pairs are suitable for reassignment to the EMRS because they are currently available for use only by governmental entities eligible in the medical services SERS category for the dispatch of medical care vehicles and personnel for the rendition and delivery of emergency medical services.[61] Virtually all entities eligible to use these frequencies will be eligible in the EMRS. Thus, we see no reason for keeping this spectrum in the SERS. Similarly, there remains no logical basis for limiting the use of these frequencies to governmental entities. The EMRS eligibility criteria provide a more accurate means for limiting the use of these frequencies to the emergency situations for which they were intended. Accordingly, we propose to reassign these frequencies to the EMRS where they will continue to be shared with the Police and Fire Radio Services.[62]

24. As indicated, the petitioners also request that ten paired 220 MHz narrowband frequencies be assigned to the EMRS to serve as a resource to satisfy future needs of EMRS licensees. In this proceeding, we have attempted to redress the congestion existing on the SERS channels dedicated primarily for EMS communications by reassigning both this spectrum and certain other frequencies to the EMRS. In addition, in view of the crucial nature of the communications at issue, we agree with IMSA/IAFC that the public interest would be served by the assignment of other available spectrum to the EMRS. Accordingly, we propose to assign the following frequency pairs to the EMRS: 220./221.9025, 220./221.9075, 220./221.9125, 220./221.9175, 220./221.9225 MHz.[63] We see this spectrum as appropriate to satisfy certain immediate demands of EMRS licensees as well as communications needs developing as the result of the long-term growth of the EMRS. We do, however, request commenters to advance suggestions with respect to whether certain use restrictions should be placed on the some of the 220 MHz channels or whether flexibility in the use of these frequencies will most adequately address the needs of EMRS users.

25. To summarize the proposed frequency assignments for the Emergency Medical Radio Service, we propose assigning the ten MED channels, comprised of the channel pairs 463./468.000, 463./468.025, 463./468.050, 463./468.075, 463./468.100, 463./468.125, 463./468.150, 463./468.175, 462./467.950 and 462./467.975 MHz, the five VHF simplex frequencies 155.325, 155.340, 155.355, 155.385 and 155.400 MHz, the frequencies 150.775 and 150.790 MHz, and the frequency pairs 220./221.9025, 220./221.9075, 220./221.9125, 220./221.9175 and 220./221.9225 MHz for exclusive use by EMRS licensees. We also propose to assign the following shared frequencies to the EMRS: 453.025/.075/.125 and .175 MHz and 458.025/.075/.125 and .175 MHz, shared with the Local Government Service for highway call box operation and, on the listed 453 MHz frequencies, with certain grandfathered SERS paging operators, and the frequency pairs 460./465.525 and 460./465.550 MHz, shared with the Police and Fire Radio Services. In addition, because it is proposed that entities eligible in the EMRS will retain their eligibility in the SERS, the applicable SERS frequencies available to EMRS entities are listed in the table of frequencies delineating the spectrum available for assignment to stations in the EMRS. This table is included in the attached Appendix A. Similarly, the table of frequencies available to EMRS entities includes certain Public Safety Radio Service frequencies available to Subpart B licensees on a shared basis.

26. Finally, throughout this proceeding we have alluded to the need for the various entities eligible in the EMRS to coordinate their operations carefully. Only with careful coordination can this spectrum be used efficiently and effectively. We propose that IMSA/IAFC be designated as the certified coordinator for the EMRS because IMSA/IAFC was primarily responsible for the coordination of EMS communications in the SERS.[64] Accordingly, applicants will be required to submit evidence of frequency coordination from IMSA/IAFC.[65] We also expect IMSA/IAFC to verify that all applications are compatible with existing regional and local emergency medical plans. In many areas, regional and local plans will pre-date applications for EMRS frequencies, and in our view, the coordinator must be responsible for ensuring that these plans have been considered and accommodated.[66] Commenters are encouraged to recommend standards and procedures designed to enhance the effectiveness of coordination among local public safety entities and the various other EMRS licensees.

V. CONCLUSION

27. In summary, we believe that the public interest will be served by the establishment of a separate Emergency Medical Radio Service. In this *Notice*, we have attempted to propose policies and rules that will improve the quality and reliability of EMS communications and promote effective operation on EMRS frequencies. We invite commenters to address all of the issues raised herein and to suggest any additional measures consistent with our goal of improving the communications capabilities of the public safety community.

VI. INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason For Action

28. The Commission believes that its rules governing the transmission of emergency medical communications should be amended to establish a discrete Emergency Medical Radio Service. Eligibility in this radio service would be limited to those entities engaged in the provision of basic or advanced life support on an ongoing basis. The proposed action would help alleviate the congestion and interference currently hampering EMS communications by restricting access to the available frequencies and by assigning additional spectrum for EMS use.

Legal Basis

29. The proposed action is authorized under Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 303(r).

Reporting, recordkeeping and other compliance requirements

30. None.

Federal rules that overlap, duplicate or conflict with this rule

31. None.

Description, potential impact, and number of small entities affected

32. This action will positively affect existing users of emergency medical communications systems as it causes more spectrum to be available for these licensees. The number of such entities affected by this action is unknown. The proposal may have some negative impact upon non-EMRS SERS licensees and SERS private carriers currently operating on frequencies proposed to be reassigned to the EMRS.

Significant Alternatives

33. Aside from maintaining the status quo or assigning spectrum from some other source, there are no significant alternatives other than those considered in this *Notice of Proposed Rule Making*.

VII. PAPERWORK REDUCTION ACT STATEMENT

34. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements and will not increase or decrease burden hours imposed on the public.

VIII. PROCEDURAL MATTERS

35. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda periods. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

36. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who makes or submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

37. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or other previous filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

38. Authority for issusance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r). Interested persons may file comments on or before **June 6, 1991** and reply comments on or before **June 21, 1991.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

39. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters at 1919 M Street, N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Part 90 of Chapter 1 of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 STAT., as amended, 1066, 1082, 47 U.S.C. 154, 303.

2. A new Section 90.27 is added to read as follows:

§ 90.27 Emergency Medical Radio Service.

(a) *Eligibility.* Persons or entities engaged in the provision of basic or advanced life support services on an ongoing basis are eligible to hold authorizations in the Emergency Medical Radio Service to operate stations for transmission of communications essential for the delivery or rendition of emergency medical services to the extent that such services include the provision of basic or advanced life support. Applications submitted by persons or organizations other than governmental entities must be accompanied by a statement prepared by the governmental body having legal jurisdiction over the area to be served indicating that the applicant is included in the state's emergency plan or otherwise supporting the application.

(b) *Frequencies available.* The following table indicates frequencies available for assignment to stations in the Emergency Medical Radio Service, together with the class of station(s) to which they are normally assigned and the specific assignment limitations explained in paragraph (c) of this section. (Frequencies below 450 MHz indicated for base or mobile stations may be authorized to fixed stations on a secondary basis to stations in the mobile service):

Emergency Medical Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Megahertz:		
72.00 to 76.00	Operational-fixed	1
150-170	Base or mobile	2
150.775	Mobile	
150.790	do	
155.325	Base or mobile	3,4
155.340	do	4,5
155.355	do	3,4
155.385	do	3,4
155.400	do	3,4
169-172	Mobile	6
220.9025	Base	25
220.9075	do	25
220.9125	do	25
220.9175	do	25
220.9225	do	25
221.9025	Mobile	25
221.9075	do	25
221.9125	do	25
221.9175	do	25
221.9225	do	25
450 to 470	Fixed	7
453.025	Base	19,22
453.050	Base or mobile	8
453.075	Base	19,22
453.100	Base or mobile	8
453.125	Base	19,22
453.150	Base or mobile	8
453.175	Base	19,22
453.200	Base or mobile	8
453.250	do	8
453.300	do	8
453.350	do	8
453.400	do	8
453.450	do	8
453.500	do	8
453.550	do	8
453.600	do	8
453.650	do	8
453.700	do	8
453.750	do	8
453.800	do	8
453.850	do	8
453.900	do	8
453.950	do	8
458.025	Mobile	19,22
458.050	do	8
458.075	do	19,22
458.100	do	8
458.125	do	19,22
458.150	do	8
458.175	do	19,22
458.200	do	8
458.250	do	8
458.300	do	8
458.350	do	8
458.400	do	8
458.450	do	8
458.500	do	8
458.550	do	8
458.600	do	8
458.650	do	8
458.700	do	8
458.750	do	8
458.800	do	8
458.850	do	8
458.900	do	8
458.950	do	8
460.525	Base or Mobile	10
460.550	do	10
462.950	do	3,11,12
462.975	do	3,11,12
463.000	do	9,13,20
463.025	do	9,13,20
463.050	do	9,13,20
463.075	do	9,13,21
463.100	do	9,13,21
463.125	do	9,13,21
463.150	do	9,13,21
463.175	do	9,13,21
465.525	Mobile	10
465.550	do	10
467.950	do	3,11,12
467.975	do	3,11,12
468.000	do	9,13,20
468.025	do	9,13,20
468.050	do	9,13,20
468.075	do	9,13,21
468.100	do	9,13,21
468.125	do	9,13,21
468.150	do	9,13,21
468.175	do	9,13,21
470 to 512	Base or Mobile	14
806 to 824	Mobile	15

851 to 869	Base or Mobile	15
928 and above	Operational-fixed	16
929 to 930	Base only	24
1427 to 1435	Operational-fixed base or mobile	17
2450 to 2500	Base or Mobile	18
10,550 to 10,680	do	23

(c) Explanation of assignment limitations appearing in the frequency table of paragraph (b) of this section:

(1) The frequencies available for use at operational-fixed stations in the band 72-76 MHz are listed in § 90.257(a)(1) of this part. These frequencies are shared with other services and are available only in accordance with the provisions of § 90.257 of this part.

(2) Rules concerning the use of this band for narrowband operations are set forth in § 90.271 of this part.

(3) A licensee regularly conducting two-way communications operations on this frequency may, on a secondary basis, also transmit one-way alert-paging signals to ambulance and rescue squad personnel.

(4) In addition to other authorized uses, the use of F1B, F1D, F2B or F2D emission is permitted on this frequency for the operation of bio-medical telemetry systems subject to the following limitations:

(i) New York, N.Y.-Northeastern New Jersey; Los Angeles-Long Beach, Calif.; Chicago, Ill.-Northwestern Indiana; Philadelphia, Pa.-N.J.; Detroit, Mich.; San Francisco-Oakland, Calif.; Boston, Mass.; Washington, D.C.-Md.-Va.; Cleveland, Ohio; St. Louis, Mo.-Ill.; Pittsburgh, Pa.; Minneapolis-St. Paul, Minn.; Houston, Tex.; Baltimore, Md.; Dallas, Tex.; Milwaukee, Wis.; Seattle-Everett, Wash.; Miami, Fla.; San Diego, Calif.; Atlanta, Ga.; Cincinnati, Ohio-Ky.; Kansas City, Mo.-Kans.; Buffalo, N.Y.; Denver, Colo.; San Jose, Calif.; New Orleans, La.; Phoenix, Ariz.; Portland, Oreg.-Wash.; Indianapolis, Ind.; Providence-Pawtucket-Warwick, R.I.-Mass.; Columbus, Ohio; San Antonio, Tex.; Louisville, Ky.-Ind.; Dayton, Ohio; Fort Worth, Tex.; Norfolk-Portsmouth, Va.; Memphis, Tenn.-Miss.; Sacramento, Calif.; Fort Lauderdale-Hollywood, Fla.; Rochester, N.Y.; Tampa-St. Petersburg, Fla.

(ii) The continuous carrier mode of operation may be used for telemetry transmissions on this frequency for periods up to two-minutes duration; following which there must be a break in the carrier for at least a one-minute period.

(iii) Geographical coordinates for the above-listed urbanized areas may be found at Table 1 of § 90.635 of this part.

(5) This frequency may be designated by common consent as an inter-system mutual assistance frequency under an area-wide medical communications plan.

(6) Frequencies in this band will be assigned for low power wireless microphones in accordance with the provisions of § 90.265 of this part.

(7) The frequencies available for use at fixed stations in this band and the requirements for assignment are set forth in § 90.261 of this part. Operation on these frequencies is secondary to stations in the Industrial and Land Transportation Radio Service where they are assigned for land mobile operations.

(8) This frequency is available in this service on a shared basis with all other Public-Safety Radio Services.

(9) The continuous carrier mode of operation may be used for telemetry transmission on this frequency.

(10) This frequency is shared with the Police and Fire Radio Services. This frequency may be designated by common consent for intra-system and inter-system mutual assistance purposes and is subject to the coordination requirements specified in § 90.175 of this part.

(11) This frequency is primarily authorized for use in the dispatch of medical care vehicles and personnel for the rendition or delivery of medical services. This frequency may also be assigned for intra-system and inter-system mutual assistance purposes. For uniformity in usage, the frequency pairs 462.950/467.950 and 462.975/467.975 MHz may be referred to as MED-9 and MED-10, respectively.

(12) This frequency is shared with Police Radio Service licensees authorized prior to April 16, 1976. This frequency is available on a primary basis to operations by licensees in the Emergency Medical Radio Service.

(13) For applications for new radio systems received after August 15, 1974, the eight frequency pairs listed below will be assigned in a block for shared operation under § 90.27(a) of this section subject to the following:

(i) For uniformity in usage, these frequency pairs may be referred to by channel name as follows:

Frequencies Base and Mobile	Mobile only	Channel name
Megahertz:	(MHz)	
463.000	468.000	MED-1
463.025	468.025	MED-2
463.050	468.050	MED-3
463.075	468.075	MED-4
463.100	468.100	MED-5
463.125	468.125	MED-6
463.150	468.150	MED-7
463.175	468.175	MED-8

(ii) Except as provided in paragraphs (c)(13)(iii) and (iv) of this section, mobile or portable stations must employ equipment that

is both wired and equipped to transmit/receive, respectively, on each of these eight frequency pairs with transmitters operated on the 468 MHz frequencies.

(iii) Portable (hand-held) units operated with a maximum output power of 2.5 watts are exempted from the multi-channel equipment requirements specified in paragraph (c)(13)(ii) in this section.

(iv) Stations located in areas above line A, as defined in § 90.7 of this part will be required to meet multi-channel equipment requirements only for those frequencies up to the number specified in paragraph (c)(13)(ii) of this section that have been assigned and coordinated with Canada in accordance with the applicable U.S.-Canada agreement.

(14) Subpart L contains rules for assignment of frequencies in the 470-512 MHz band.

(15) Subpart S contains rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

(16) Assignment of frequencies above 928 MHz for operational-fixed stations is governed by Part 94 of this Chapter.

(17) This frequency band is available in this service subject to the provisions of § 90.259 of this part.

(18) Available only on a shared basis with stations in other services, and subject to no protection from interference due to the operation of industrial, scientific, or medical (ISM) devices. In the 2483.5-2500 MHz band, no applications for new or modifications to existing stations to increase the number of transmitters will be accepted. Existing licensees as of July 25, 1985, or on a subsequent date as a result of submitting an application for license on or before July 25, 1985, are grandfathered and their operation is co-primary with the Radiodetermination Satellite Service.

(19) Paging licensees as of March 20, 1991 may continue to operate on a primary basis until [5 years from adoption of R & O in this proceeding].

(20) This frequency is authorized for use only for operations in bio-medical telemetry stations. F1B, F1D, F2B, F2D, F3E, G1B, G1D, G2B, G2D and G3E emissions may be authorized. Entities eligible in this Radio Service may use this frequency on a secondary basis for any other permissible communications consistent with § 90.27(a).

(21) This frequency is authorized for use only in communications between medical facilities vehicles and personnel related to medical supervision and instruction for treatment and transport of patients in the rendition or delivery of medical services. F1B, F1D, F2B, F2D, G1B, G1D, G2B, G2D, F3E and G3E emissions are authorized. Entities eligible in this Radio Service may use this frequency on a secondary basis for any other permissible communications consistent with § 90.27(a) of this section.

(22) Local government highway radio call box operations first licensed prior to 3/31/80 on this frequency may continue to operate in accordance with § 90.17(c)(11) of this part.

(23) This band is available for Digital Termination Systems and for associated internodal links under Part 94 of this Chapter. No new licenses will be issued under this subpart but current licenses will be renewed.

(24) Frequencies in this band are available only for one-way paging operations in accordance with § 94.494.

(25) Rules concerning the use of this frequency are set forth in Subpart T.

3. Section 90.53 is amended by revising the table in paragraph (a) and by revising paragraphs (b)(7), (9), (10), (13)-(20), (26), (29), (32) and (34) to read as follows:

§ 90.53 Frequencies available.

(a) * * *

Special Emergency Radio Service Frequency Table

Frequency or band	Class of station(s)	Limitations
Kilohertz:		
2000-3000	Fixed	1
2726	Base or mobile	2
3201	do	
Megahertz:		
33.02	do	3,25
33.04	do	25
33.06	do	3,25
33.08	do	25
33.10	do	3,25
35.02	Mobile	27
35.64	Base	4
35.68	do	4
37.90	Base or mobile	3,25
37.94	do	3,25
37.98	do	3,25
43.64	Base	4,28
43.68	do	4
45.92	Base or mobile	25
45.96	do	25
46.00	do	25
46.04	do	25
47.42	do	5,25
47.46	do	25
47.50	do	25
47.54	do	25
47.58	do	25
47.62	do	25
47.66	do	25
72.00 to 76.00	Operational-fixed	6
150-170	Base or mobile	30
152.0075	Base	4,31
155.160	Base or mobile	25
155.175	do	25
155.205	do	25
155.220	do	25
155.235	do	25
155.265	do	25

155.280	do	25
155.295	do	25
157.450	Base	4,11
163.250	do	4
169-172	Mobile	33
450 to 470	Fixed	12
453.025	Base	26
453.075	do	26
453.125	do	26
453.175	do	26
458.025	Mobile	26
458.075	do	26
458.125	do	26
458.175	do	26
806 to 824	Mobile	21
851 to 869	Base or mobile	21
928 and above	Operational-fixed	22
929 to 930	Base only	7
1427 to 1435	Operational-fixed, base or mobile	23
2450 to 2500	Base or mobile	24
10,550 to 10,680	do	9

(b) * * *

(7) Frequencies in this band are available only for one-way paging operations in accordance with § 90.494 of this part.

* * * * *

(9) This band is available for Digital Termination Systems and for associated internodal links under Part 94 of this Chapter. No new licenses will be issued under this subpart but current licenses will be renewed.

(10) [Reserved]

* * * * *

(13) [Reserved]

(14) [Reserved]

(15) [Reserved]

(16) [Reserved]

(17) [Reserved]

(18) [Reserved]

(19) [Reserved]

(20) [Reserved]

* * * * *

(26) Paging licensees as of March 20, 1991 may continue to operate on a primary basis until (5 years from adoption of R & O in this proceeding).

* * * * *

(29) [Reserved]

* * * * *

(32) [Reserved]

* * * * *

(34) [Reserved]

* * * * *

4. Section 90.55 is amended by revising the first sentence of the introductory text to read as follows:

§ 90.55 Paging operations.

Paging operations may be authorized in this service only on frequencies assigned under the provisions of §§ 90.53(b)(4), (25) and (26) of this part. * * *

* * * * *

5. Section 90.176 is amended by revising paragraphs (a) and (b) and adding paragraph (c) to read as follows:

§ 90.176 Interservice sharing of frequencies in the 150 - 174 and 450 - 470 MHz bands.

(a) Entities eligible in the Public Safety Radio Services governed by this rule part may apply to use any of the above-mentioned frequencies allocated to these services. Applicants are required to make the showing set forth in paragraph (c) of this section.

(b) Entities eligible in the Special Emergency Radio Service or the Industrial and Land Transportation Radio Services governed by this rule part may apply to use any of the above-mentioned frequencies allocated to these services. Applicants are required to make the showing set forth in paragraph (c) of this section.

(c) Applications for frequencies available under this rule must be accompanied by:

(1) A determination by the applicable frequency coordinator that there are no satisfactory frequencies available within the applicant's own radio service in the area of desired operation;

(2) A demonstration that the frequency(ies) requested in another radio service are not assigned in that radio service in the area of desired operation;

(3) A statement from the frequency coordinator having responsibility for coordination in the radio service or group in which the frequency is assigned concurring in its assignment in the manner requested. In cases where concurrence is not given, the coordinator must provide an explanation why the requested sharing is inappropriate;

(4) A statement or showing that the proposed use of the assignment will not violate any of the technical limitations applicable in the service or services to which the frequency is regularly allocated.

6. The table in Section 90.311(a) is amended by revising the column heading under "Public Safety Pool" to list the radio services as follows:

* * * * *

Fire, Police, Local Government, Highway Maintenance, Forestry Conservation and Emergency Medical Radio Services.

* * * * *

7. Section 90.555 is amended by revising the list of letter symbols under Public Safety Services in the table in paragraph (a), revising the entries for the applicable frequencies in paragraph (b) and adding the frequencies 220.9025 through 221.9225 in paragraph (b) to read as follows:

§ 90.555 Combined frequency listing.

(a) * * *

PUBLIC SAFETY SERVICES

PF-Fire.

PH-Highway maintenance.

PL-Local government.

PO-Forestry-conservation.

PP-Police.

PS-Special Emergency.

PM-Emergency Medical.

(b) Combined frequency list.

Frequency	Services	Special limitations
	* * * * *	
150.775	PM	Mobile
150.790	PM	Do
	* * * * *	
155.325	PM	
155.340	PM	
155.355	PM	
	* * * * *	
155.385	PM	
155.400	PM	
	* * * * *	
220.9025	PM	
220.9075	PM	
220.9125	PM	
220.9175	PM	
220.9225	PM	
221.9025	PM	
221.9075	PM	
221.9125	PM	
221.9175	PM	
221.9225	PM	
	* * * * *	
453.025	PM	
453.050	PL, PP, PF, PH, PO, PM	
453.075	PM	
453.100	PL, PP, PF, PH, PO, PM	
453.125	PM	
453.150	PL, PP, PF, PH, PO, PM	
453.175	PM	
453.200	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.250	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.300	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.350	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.400	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.450	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.500	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.550	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.600	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.650	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.700	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.750	PL, PP, PF, PH, PO, PM	
	* * * * *	
453.800	PL, PP, PF, PH, PO, PM	

* * * * *

453.850	PL, PP, PF, PH, PO, PM

* * * * *

453.900	PL, PP, PF, PH, PO, PM

* * * * *

453.950	PL, PP, PF, PH, PO, PM

* * * * *

458.025	PM
458.050	PL, PP, PF, PH, PO, PM
458.075	PM
458.100	PL, PP, PF, PH, PO, PM
458.125	PM
458.150	PL, PP, PF, PH, PO, PM
458.175	PM
458.200	PL, PP, PF, PH, PO, PM

* * * * *

458.250	PL, PP, PF, PH, PO, PM

* * * * *

458.300	PL, PP, PF, PH, PO, PM

* * * * *

458.350	PL, PP, PF, PH, PO, PM

* * * * *

458.400	PL, PP, PF, PH, PO, PM

* * * * *

458.450	PL, PP, PF, PH, PO, PM

* * * * *

458.500	PL, PP, PF, PH, PO, PM

* * * * *

458.550	PL, PP, PF, PH, PO, PM

* * * * *

458.600	PL, PP, PF, PH, PO, PM

* * * * *

458.650	PL, PP, PF, PH, PO, PM

* * * * *

458.700	PL, PP, PF, PH, PO, PM

* * * * *

458.750	PL, PP, PF, PH, PO, PM

* * * * *

458.800	PL, PP, PF, PH, PO, PM

* * * * *

458.850	PL, PP, PF, PH, PO, PM

* * * * *

458.900	PL, PP, PF, PH, PO, PM

* * * * *

458.950	PL, PP, PF, PH, PO, PM

* * * * *

460.525	PP, PF, PM
460.550	PP, PF, PM

* * * * *

462.950	PM	Med 9.
462.975	PM	Med 10.
463.000	PM	Med 1.
463.025	PM	Med 2.
463.050	PM	Med 3.
463.075	PM	Med 4.
463.100	PM	Med 5.
463.125	PM	Med 6.
463.150	PM	Med 7.
463.175	PM	Med 8.

* * * * *

465.525	PP, PF, PM
465.550	PP, PF, PM

* * * * *

467.950	PM	Med 9.
467.975	PM	Med 10.
468.000	PM	Med 1.
468.025	PM	Med 2.
468.050	PM	Med 3.
468.075	PM	Med 4.
468.100	PM	Med 5.
468.125	PM	Med 6.
468.150	PM	Med 7.
468.175	PM	Med 8.

* * * * *

APPENDIX B

Comments

State of Alaska Department of Health and Social Services

State of Alaska Division of Telecommunications Operations

AMBUCARE Ambulance Service

Ambulance Service of Roane County

Associated Public-Safety Communications Officers, Inc(APCO)

City of Bartlett

Bedford County Emergency Medical Service

Benton County Community Hospital

Bristol Life Saving Crew, Inc.

Business Jet Air Ambulance, Inc.

State of California Emergency Medical Services Authority (SCEMSA)

Cannon County Ambulance Service

Cheatham County Emergency Management Agency

Chester County Emergency Medical Services

Columbia County Emergency Medical Services

Connecticut Office of Emergency Medical Services

Cumberland County Emergency Medical Services

Decatur County Emergency Medical Service

DeKalb County Emergency Medical Services

Emergency Medical Foundation, Inc.

EMMOCO West, Inc.

Erlancer Medical Center

Fentress County Ambulance Service

Florida Association County Emergency Medical Services, Inc.

State of Florida Department of General Services

State of Florida Department of Health and Rehabilitative Services

Fort Sanders Loudon Emergency Medical Medical Services

The Gatlinburg Fire Department

Gibson County Ambulance Authority

Grace Hospital

Green County/Greenville Emergency Medical Service

Hawkins County Emergency Medical Services, Inc.

Health Emergency Medical Services, Inc.

Henry County Medical Center

Hickman County Ambulance Service

Jackson County Ambulance Service

LaFollette Ambulance Service

Lauderdale County Ambulance

Lawrence County Ambulance Service

Lebanon, Wilson County Civil Defense

City of Louisville

Lycoming County Department of Emergency Services

Macon County Ambulance Service

Magnolia Hospital

Martin-Marietta Energy Systems, Inc.

Maryland Institute for Emergency Medical Services Systems

Maury County Emergency Medical Services

Medi-Call Emergency Ambulance Service, Inc.

Medical Priority Consultants, Inc.

City of Memphis

Memphis Medcom

Methodist Hospital of Dyersburg

Methodist Hospitals of Memphis

Michigan Department of Natural Resources

Monroe County Ambulance Service

Morristown-Hamblen Emergency Medical Service

Murfreesboro Convalescent Ambulance Service

Metropolitan Government of Nashville and Davidson County

National Association of Business and Educational Radio, Inc(NABER)

National Association of State Emergency Medical Services Directors

National Association of State Telecommunications Directors

State of New Jersey Department of Health

State of New York Department of Health

Oakland County, Michigan Department of Public Service

ProNet, Inc.

Public Safety Communications Council

Putnam County Emergency Medical Services

City of Red Bank, Tennessee

Rutherford County Emergency Medical Services

Sharpe's Ambulance Service, Inc.

Sequatchie Valley Emergency Medical Service

Sevier County Ambulance Authority

Spacelabs, Inc.

South Carolina Department of Health and Environmental Control

State of Tennessee Association of Rescue Squads

State of Tennessee Department of Corrections

State of Tennessee Department of Health and Environment

Texas Department of Health

Dr Michael C Trahos

Utah Department of Health

Carl C Van Cott

Virginia Division of Emergency Medical Services

County of Wake

Washington County-Johnson City Emergency Medical Services, Inc.

Western Piedmont Council of Governments

West Virginia Office of Emergency Medical Services

White Bluff Volunteer Fire Department

Williamson Medical Center

Reply Comments

The International Municipal Signal Association and the International Association of Fire Chiefs, Inc(IMSA/IAFC)

Pro Net, Inc.

FOOTNOTES

[1] Petition for Rule Making, RM-7336, filed by IMSA/IFAC on March 15, 1990. The petition was placed on Public Notice on April 4, 1990, Report No. 2527.

[2] *See, e.g.*, Report and Order, Docket No. 19880, 47 FCC 2d 676, 678 (1974).*See also* Report and Order, PR Docket No. 87-312, 3 FCC Rcd 3677, 3683 (1988).

[3] Common examples of emergency medical communications include the exchange of information concerning the following: measures needed to stabilize life-threatening conditions; the use of invasive life support treatments; appropriateness and readiness of hospitals to receive medical emergency cases; and biomedical telemetry of patient vital signs. *See* 47 C.F.R. §§ 90.53(a), 90.53(b)(15), (16), (19), (20) and (25). *See also* Report and Order, PR Docket No. 87-312, 3 FCC Rcd at 3682.

[4] *See* 47 C.F.R. §§ 90.53(a), (b)(19). *See also* Report and Order, PR Docket No. 87-312, 3 FCC Rcd at 3682.

[5] 47 C.F.R. § 90.33. Private carriers are permitted to serve SERS eligibles on the one-way, paging-only channels. *See* Memorandum Opinion and Order, PR Docket No. 87-312, 5 FCC Rcd 3471, 3472 (1990).

[6] *See* 47 C.F.R. § 90.35.

[7] Our rules authorize certain specific primary uses of the MED channels. MED channels 1, 2, and 3 are reserved on a primary basis for biomedical telemetry. 47 C.F.R. § 90.53(b)(19). MED channels 4, 5, 6, 7, and 8 are reserved for "communications between medical facilities vehicles and personnel related to medical supervision and instruction for the treatment and transport of patients in the rendition or delivery of medical services." 47 C.F.R. § 90.53(b)(20). The permissible primary uses of MED channels 9 and 10 are the "dispatch of medical care vehicles and personnel for the rendition or delivery of medical services." 47 C.F.R. § 90.53(b)(16).

[8] *See* 47 C.F.R. § 90.53(b)(15)(i), (16), (19), (20). Secondary administrative communications are, however, banned on MED channels 1 through 8. *See* Memorandum Opinion and Order, PR Docket No. 87-312, 5 FCC Rcd at 3473. MED channels 9 and 10 may be used on a secondary basis only for paging medical vehicles and crews. *Id.*

[9] *See* 47 C.F.R. § 90.53(a), (b)(9) and (b)(10).

[10] *See* IMSA/IAFC Petition at 7-10. *See also, e.g.*, Comments of NABER; Comments of APCO; Comments of Dr. Michael C. Trahos; Comments of SCEMSA. A complete list of commenters is attached as Appendix B.

[11] IMSA/IAFC Petition at 7-10.

[12] *See* IMSA/IAFC Petition at 10.

[13] *Id.* at 27. Several Public Safety Radio Service frequencies in the 453.050 through 458.950 MHz range are available to Public Safety Radio Service licensees on a shared basis with all other Public Safety Radio Services. *See* 47 C.F.R. §§ 90.17(c)(12), 90.19(e)(16), 90.21(c)(7). In conjunction with their suggestion that the EMRS be located in Subpart B of our Rules, IMSA/IAFC request us to amend 47 C.F.R. § 90.176(a) to provide that non-EMRS SERS licensees be prohibited from applying for interservice sharing of frequencies allocated to the Public Safety Radio Services. Reply Comments of IMSA/IAFC at 5. *See* para. 15, *infra*.

[14] Reply Comments of IMSA/IAFC at 8.

[15] IMSA/IAFC Petition at 14-15.

[16] IMSA/IAFC contend that the reassignment of these frequencies to the EMRS, in conjunction with the eligibility restriction proposed for the EMRS, will render several limitations currently applicable to these frequencies unnecessary. *See* paras. 17 and 18, *infra*.

[17] *See* 47 C.F.R. § 90.53(b)(7).

[18] IMSA/IAFC Petition at 21. The petitioners suggest permitting existing low power mobile repeater systems to remain primary systems indefinitely.

[19] *Id.*

[20] *Id.* at 21, 22-23. The use of these 458 MHz frequencies is limited to certain transmissions with a maximum output power of 1 watt. *See* 47 C.F.R. § 90.53(b)(13). The use of the 453 MHz frequencies at issue is limited to certain one-way paging operations. *See* 47 C.F.R. § 90.53(b)(26). The petitioners suggest permitting low power mobile repeaters currently operating on the 458 MHz frequencies to remain primary systems indefinitely. In addition, the petitioners propose that future low power mobile repeater requirements be accommodated on the UHF 12.5 kHz offset channels. IMSA/IAFC Petition at 21. The petitioners suggest grandfathering existing one-way paging operations on the 453 MHz frequencies indefinitely. Supplemental Response of IMSA/IAFC at 4 n.6. These issues are discussed in paragraphs 19-23, *infra*.

[21] *Id.* at 26. *See also* Notice of Proposed Rule Making, PR Docket No. 89-599 (1989). *See also* para. 24, *infra*.

[22] *See supra* note 10; *see also* Comments of ProNet, Inc.

[23] *See supra* note 10.

[24] *See* Comments of SCEMSA at 3; *see also* Comments of APCO at 5.

[25] Comments of NABER at 3-4.

[26] *See e.g.*, Comments of APCO at 4-5; Comments of Spacelabs, Inc., at 1-2. The particular concerns of these commenters are discussed, *infra*.

[27] *See generally* Reply Comments of ProNet.

[28] *See, e.g.*, Report and Order, PR Docket No. 81-110, 46 Fed. Reg. 55701, 55703 (November 12, 1981).

[29] *See supra* note 13.

[30] *See* Comments of APCO at 2-3.

[31] *See* Reply Comments of IMSA/IAFC at 7-8.

[32] Comments of NABER at 3-4. NABER's concern is that business related SERS licensees be protected from any negative consequences as the result of the establishment of the EMRS. It is unlikely that any such negative consequences will result from EMRS access to SERS spectrum. We anticipate that EMRS entities will only seek access to SERS spectrum where necessary for purposes of local mutual aid or system interoperability. Primarily, EMRS requirements will be fulfilled on the EMRS frequencies.

[33] This requirement is patterned after those governing eligibility in the Fire and Forestry-Conservation Radio Services. *See* 47 C.F.R. §§ 90.21(a), 90.25(a). The purpose of these provisions is to permit licensing of non-government entities that might be ineligible in the particular radio service but who can satisfy the applicable restrictions on the use of the frequencies.

[34] *See* Comments of SCEMSA at 3; Comments of APCO at 5.

[35] *See* Reply Comments of IMSA/IAFC at 5.

[36] *See* 47 C.F.R. § 90.176(a). Section 90.176 is applicable to the frequencies in the 150-174 and 450-470 MHz bands.

[37] *See* 47 C.F.R. § 90.176(b). *See also* Report and Order, PR Docket No. 81-110, 46 Fed. Reg. 55701.

[38] Our initial decision to disallow the use of SERS frequencies for interservice sharing was premised upon our desire to protect the transmission of EMS communications from this additional source of potential users. *See* Report and Order, PR Docket No. 81-110, 46 Fed. Reg. 55701.

[39] This type of sharing will not overburden EMRS spectrum because the restrictions on the use of EMRS frequencies will also be applicable to licensees gaining access to this spectrum through interservice sharing. As such, interservice sharing will be a useful concept with respect to only some of the EMRS frequencies because many of the EMRS channels have such specific use restrictions that if the applicant could satisfy these, it would have been eligible in the EMRS in the first instance.

[40] The removal of EMS providers from the SERS renders the government versus non-government distinction unnecessary.

[41] *See supra* note 38.

[42] The specific channel pairs forming MED channels 1 through 8 are 463.000/468.000, 463.025/468.025, 463.050/468.050, 463.075/468.075, 463.100/468.100, 463.125/468.125, 463.150/468.150 and 463.175/468.175 MHz. MED channels 9 and 10 are formed of the channel pairs 462.950/467.950 and 462.975/467.975 MHz.

[43] The use and eligibility restrictions proposed for the EMRS are likely to exclude certain medical services providers now eligible to use the MED channels from continuing to have access to these frequencies. For example, a physician, institution or association eligible to use the MED frequencies under our current rules may not satisfy the EMRS criteria limiting eligibility to entities that provide basic or advanced life support services on an ongoing basis.

[44] *See* 47 C.F.R. § 90.233.

[45] Report and Order, Docket No. 19880, 47 FCC 2d 676, 685 (1974).

[46] Likewise, in PR Docket. No. 87-312, 5 FCC Rcd at 3473-74 (Memorandum Opinion and Order), we rejected the suggestion that we eliminate all secondary uses on the MED channels and that we permit both biomedical telemetry and medical control on each channel on a primary basis. We chose instead to leave the designated primary uses intact, allowing each MED channel to be devoted to particular emergency medical functions on a primary basis while at the same time granting licensees the freedom to use the channels for broader medical communications on a secondary basis.

[47] In its comments, Spacelabs states that although it opposes the proposed deletion of the restrictions set forth in 47 C.F.R. §§ 90.53(b)(19) and (20), it would support a plan to make the MED channels available for assignment solely for continuous mode medical telemetry transmissions from mobile or portable units. In support of this suggestion, Spacelabs notes that under our existing rules, this type of operation is authorized only in the Business Radio Service. According to Spacelabs, this allocation is insufficient to meet the demands of many medical facilities. Although we believe that Spacelabs' proposal would unduly hamper the flexibile use of the frequencies in question, we request commenters to discuss the merits of Spacelabs' suggestion.

[48] *See, e.g.*, Comments of APCO at 3; Comments of SCEMSA at 3.

[49] Supplemental Response of IMSA/IAFC at 5.

[50] *Id.*

[51] 47 C.F.R. § 90.53(b)(26).

[52] *See* Reply Comments of ProNet at 9.

[53] *See* Memorandum Opinion and Order, PR Docket No. 87-312, 5 FCC Rcd at 3471.

[54] *See* 47 C.F.R. §§ 90.53(b)(4), (26).

[55] 47 C.F.R. § 90.53(b)(13).

[56] *See* Report and Order, PR Docket No. 80-605, 87 FCC 2d 647, 647-48 (1981).

[57] For example, licensees are ordinarily limited to a maximum output power of 2 watts and are licensed on a secondary noninterference basis to users on the primary channels. *See* 47 C.F.R. §§ 90.267(a)(1), (2).

[58] We note the 453 and 458 MHz frequencies under discussion are shared with the Local Govenment Service in the Public Safety Radio Services for highway call box operation. *See* 47 C.F.R. § 90.53(b)(13); *see also* 47 C.F.R. §§ 90.17(b), (c)(11). We propose to grandfather existing highway call box operations licensed on these frequencies indefinitely.

[59] 47 C.F.R. § 90.53(b)(7).

[60] *See* Memorandum Opinion and Order, Docket No. 19880, 49 FCC 2d at 372.

[61] *See* 47 C.F.R. § 90.53(b)(34).

[62] *See* 47 C.F.R. § 90.53(b)(17).

[63] EMRS use of these frequencies will be in accordance with any technical rules adopted in PR Docket No. 89-552.

[64] We note, however, that NABER and IMSA/IAFC will remain the tri-coordinators of the SERS.

[65] The requirement for coordination through a certified frequency coordinator is, however, contingent upon the final resolution of our pending proposal to permit applicants for private land mobile licenses to submit direct access applications. *See generally* Notice of Proposed Rule Making, PR Docket No. 88-548, 4 FCC Rcd 6325 (1989).

[66] *See* Comments of APCO at 5; Comments of SCEMSA at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WESTERN FLORIDA CELLULAR TELEPHONE CORP. File No. 04576-CL-MP-90

For facilities in the Domestic Public Cellular Telecommunications Radio Service on Frequency Block A, in Market No. 265, Fort Walton Beach, Florida MSA, for station KNKA739

MEMORANDUM OPINION AND ORDER

Adopted: April 9, 1991; Released: April 12, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Western Florida Cellular Telephone Corp. (Western) filed the captioned application to add a new cell to its existing non-wireline cellular system in the Fort Walton Beach, Florida Metropolitan Statistical Area (MSA). The proposed cell's 39 dBu contour would extend beyond the boundary of the Fort Walton Beach MSA and into the adjacent Florida 10 - Walton Rural Service Area (hereinafter "Walton RSA"). Centel Cellular Company of Fort Walton Beach Limited Partnership (Centel), the wireline licensee in the Fort Walton Beach MSA, and Florida 10 RSA Limited Partnership (Florida 10), the wireline tentative selectee for the Walton RSA (collectively referred to as "petitioners"), filed a petition to deny. Western filed a response. For the reasons set forth below, we deny the petition and grant Western's application.

II. DISCUSSION

2. The petitioners argue that Western's application should be dismissed because the proposed 39 dBu contour extension is not *de minimis*. They contend that Western has failed to demonstrate that the extension is necessary or that it has made a good faith effort to limit the extension. The petitioners point out that the extension, covering 10.7 percent of the cell and extending 26.1 square miles into the adjacent Walton RSA, encompasses a stretch of heavily traveled State Highway 20 in the Walton RSA, a state recreational park, and part of Eglin Air Force Base. Furthermore, they state that the MSA boundary over which the proposed 39 dBu extends is straight rather than irregular and that Western has cited no terrain difficulties that would necessitate the proposed extension. Finally, the petitioners contend that the extension could be eliminated or minimized by using a more directional antenna.

3. Western argues that the extension should be allowed because the extension is minor, representing only .85 percent of the Walton RSA and one percent of the combined Pensacola and Fort Walton Beach MSAs. Western maintains that the extension covers a sparsely populated area in the Walton RSA with only one public road, a little traveled two-lane state highway. It points out that while the extension covers a portion of Eglin Air Force Base and a state recreational park, large portions of these facilities are contained within the MSA where it provides coverage. Western argues that the principal purpose of the extension is to improve service within the MSA. However, it points out that because the MSA area to be covered by the proposed cell is so close to the border of the Walton RSA that some overlap into the RSA is unavoidable. It asserts that the antenna system for the proposed cell site will be directionalized to minimize the extension, without sacrificing the quality of service in the MSA. Finally, Western states that its does not seek interference protection outside of the MSA and will coordinate with future co-channel licensees in the extension area and will, if necessary, pull back its 39 dBu contours if such licensees encounter interference.

4. In *Procedures Update*, 52 RR 2d 725 (1982), *aff'd. Cellular Radio Service*, 56 RR 2d 1583 (1984), and in Section 22.903(a) of the rules[1] the Commission established guidelines for configuring 39 dBu contours. The Commission stated that 39 dBu contours should be contained entirely within the MSA or NECMA but that a minor extension beyond the MSA or NECMA would not render an application defective if the application included "a specific explanation of why it was necessary to engineer the particular cell(s) such that the 39 dBu contours could not be kept entirely within the MSA (or NECMA).[2] In evaluating proposed extensions, we take a variety of factors into account, such as the terrain and population of the area in question, the shape of the adjoining boundaries and any extenuating engineering problems. In analyzing the application, we look first to see if the extension is minor, and then we evaluate the engineering explanation. *See e.g., Saco River Cellular Telephone Company*, 2 FCC Rcd 2009 (Mob. Serv. Div. 1987); *Metroplex Telephone Company*, 2 FCC Rcd 7301 (Mob. Serv. Div. 1987); and *GTE Mobilnet of South Texas Limited Partnership*, 4 FCC Rcd 1657 (Mob. Serv. Div. 1989).

5. We find that the extension proposed here is small in size, amounting to only 10.7 percent of the total cell area[3] and one percent of the MSA.[4] Although the MSA boundaries are straight and no terrain difficulties exist, Western indicates that there is no technically feasible way to serve that portion of the MSA in which it seeks to provide coverage without some extension beyond the MSA boundary. In its application, Westerns states that "the extension has been minimized by use of a directional antenna." Furthermore, the proposed extension does not cover any major population centers in the RSA. As to the coverage along State Highway 20, we note that the extension covers less than three miles of State Highway 20 into the Walton RSA.

6. Based on the foregoing considerations, we find that Western's explanation is sufficiently specific to meet the requirements set out in *Procedures Update*, 52 RR at 726.[5] We therefore conclude that the proposed extension is *de minimis* and permissible.

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED THAT the petition to deny filed by Centel Cellular Company of Fort Walton Beach Limited Partnership and Florida 10 RSA Limited Partnership IS DENIED.

8. IT IS FURTHER ORDERED THAT the application of Western Florida Cellular Telephone Corp. (File No. 04576-CL-MP-90) IS GRANTED. This authorization does not include the right to any interference protection in any areas outside of the Fort Walton Beach MSA and is conditioned upon coordinating with the current and future co-channel licensees in the areas outside the MSA. The licensee herein is put on notice that in the event current or future MSA/RSA licensees encounter interference from any extensions, the licensee herein will have to change frequencies in those cells or pull back its 39 dBu contours to eliminate any interference due to an extension.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 22.903(a) states in pertinent part:

> The Cellular Geographic Service Area (CGSA) of the cellular system shall be defined by the applicant as the area intended to be served. No CGSA, which includes areas within a Metropolitan Statistical Area (MSA), or in New England, a New England County Metropolitan Area (NECMA), as modified in paragraph (e), of this section, below, may extend beyond the boundaries of the MSA or NECMA, except where any such extensions are *de minimis* and do not include areas within another central MSA or NECMA.

[2] *Procedures Update*, 52 RR 2d at 726.

[3] *See e.g., Houston Cellular Telephone Company*, 5 FCC Rcd 7140 (Mob. Serv. Div. 1990), (19.8 percent cell extension is *de minimis); Rhys G. Mussman*, 3 FCC Rcd 6808 (Com. Car. Bur. 1988), (19 percent cell extension is *de minimis); South Carolina Metronet, Inc.*, DA 91-168, released February 19, 1991, (16.7 percent cell extension is *de minimis*).

[4] *See e.g.,* Saco River, 2 FCC Rcd at 2009, (6 percent of New England County Metropolitan Area (NECMA) is *de minimis*); *New York Cellular Geographic Service Area, Inc.*, 5 FCC Rcd 3819 (Mob. Serv. Div. 1990), (5 percent of MSA is *de minimis*).

[5] *See e.g., GTE Mobilnet of South Texas*, 4 FCC Rcd at 1657. *Cf., Round IV Cellular Applications*, 103 FCC 2d 171, 177-83 (1986) (statements which did not specify particular cells or particular areas needing coverage failed to provide adequate explanation for proposed 39 dBu contour extensions), *aff'd mem.*, 813 F.2d 472 (D.C. Cir. 1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 13, 1991

Released: April 12, 1991

CERTIFIED MAIL RETURN RECEIPT REQUESTED

James W. Tyree, 8310-SP
Executive Director C5-229
Economic Opportunity C9-525
Board of Clark County C10-30
Licensee, Radio Station KCEP-FM
2228 Comstock Drive
Las Vegas, Nevada 89030

Dear Mr. Tyree:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture against the Economic Opportunity Board of Clark County, licensee of Noncommercial Radio Station KCEP-FM, Las Vegas, Nevada, pursuant to Sections 503(b) of the Communications Act of 1934, as amended, and 0.283 of the Commission's Rules.

As a result of information received by the Commission indicating that promotional announcements were broadcast on Station KCEP-FM on April 23, 24, and 26, 1990, the Commission directed a letter of inquiry to you, dated September 7, 1990. Transcripts of the questionable announcements are attached hereto and incorporated by reference herein.

In your September 27, 1990, response to the Commission's letter of inquiry, you concede that KCEP-FM broadcast the announcements in return for consideration. You also admit that their content was "outside the bounds of the FCC's requirements for underwriting announcements." You state that such announcements were broadcast consistently during a seven month period during which the station was under new management. You claim that the new general manager did not know of the station's "ongoing policies" regarding underwriting announcements. You indicate that as a result of our investigation, KCEP-FM has taken steps to assure that such violations will not recur.

Section 399B of the Communications Act of 1934, as amended, and Section 73.503(d) of the Commission's Rules specifically prohibit noncommercial stations from broadcasting announcements that promote the sale of goods and services of for-profit entities in exchange for consideration paid to the station. Although contributors of funds may receive on-air acknowledgements, the Commission has unequivocally stated that such acknowledgements may be made "for identification purposes only and should not promote the contributor's products, services, or company." Accordingly, such announcements may not contain comparative or qualitative descriptions, price information, calls to action, or inducements to buy, sell, rent or lease. (*See Public Notice*, "In the Matter of Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations," FCC 86-161, No. 36590, April 11, 1986.)

The announcements that were the subject of this investigation, which were repeatedly broadcast on Station KCEP-FM, fail to comport with the Commission guidelines regarding donor acknowledgements. They contain comparative or qualitative descriptions, calls to action, inducements to buy, or otherwise exceed the identification-only purpose of underwriting acknowledgements by generally promoting the sale of goods and/or services of for-profit entities.

The FCC has consistently stated that such factors as employee error or ignorance of FCC requirements will not excuse a licensee from its obligation to operate a station in compliance with the terms of the authorization and the Commission's Rules. Additionally, we have stated many times that licensees cannot be excused for the acts of their employees. *Empire Broadcasting Corp.*, 25 FCC 2d 68 (1970).

Accordingly, pursuant to Section 503(b) of the Communications Act, the Economic Opportunity Board of Clark County, licensee of Station KCEP(FM), Las Vegas, Nevada, is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE in the amount of $3,000.00 for the apparent repeated violation of Section 399B of the Communications Act of 1934, as amended.

In regard to this forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this letter.

Sincerely,

Roy J. Stewart,
Chief, Mass Media Bureau

ATTACHMENTS

KCEP-FM Transcript - April 23, 24, and 26, 1990

1. **Artumus Ham Concert Hall**:

Valley Bank of Nevada, Prime Cable and the Las Vegas Sun present an evening of jazz, wine, art and the sweet, soft sounds of George Howard, Sunday, May 6th at 8:30 PM inside the Artumus Ham Concert Hall. But wait, come early - 7 PM - and enjoy the fine wines of Preston Manor vineyards and the fine arts of Meelyn Galleries. Tickets on sale now at the Artumus Ham box office, DePaulis Music, Vesley Music, the Upper Ear and all Ticketron outlets. So get your tickets now for an evening of jazz, wine, art and the sweet, soft sounds of George Howard. A Michael Skeball Production and your rhythm radio, FM 88.

2. **Rahim's Detailing Auto Center**:

KCEP's programming is being underwritten by Rahim's Detailing Auto Center. Rahim's Detailing Auto Center features auto waxing, shampoo, buff, engine steam cleaning and hand wash. Rahim's will pick up your auto and

deliver it to you. Rahim's also features a ladies' day every Tuesday. Rahim's - located at 2955 Las Vegas Boulevard North at the corner of Pecos and Las Vegas Boulevard. Directly across the street from the Broad Acres Swap Meet. Rahim's Detailing Auto Center. Their phone number is 399-4722. Rahim's Detailing Auto Center. Another proud supporter of your FM 88.

3. **Chrysler Plymouth (J. Elliott)**

Funding for this portion of KCEP's programming is provided in part from an underwriting grant from J. Elliott Las Vegas Chrysler-Plymouth, 2100 South Decatur Boulevard. J. Elliott specializes in new and used cars, both imported and domestic. J. Elliott offers no down payment on approved credit and also accepts income tax returns as a down payment on approved credit. J. Elliott offers up to 3,000 dollars in cash rebates - That's J. Elliott Las Vegas Chrysler-Plymouth, 2100 South Decatur Boulevard. The number is 870-9793. J. Elliott is a proud supporter of your Rhythm Radio, FM 88.

4. **Plush Horse Lounge**:

Have you been searching all over town for a real ladies' night party? Well, look no further because the Plush Horse Lounge is the real home of the real Thursday night Ladies' Night Party. Ladies, this party is designed with you in mind. ("Heavy D: How can that big ol' boy get all them wimmens?") Ladies, this party is designed with you in mind. Admission for the ladies is free all night long and any drink you want is on the house from 9 PM until midnight. You can't afford to pass this party up, ladies. It's at the Plush Horse Lounge this Thursday night. They're located at 545 East Sahara. Dance and dine seven days a week at the Plush Horse Restaurant and Night Club. Parts of proceeds from this party will benefit your Rhythm Radio, FM 88.

5. **Michael Scivo - Troup Concert**

Sunday evening May 13th its Troup live in concert inside the Artumus Ham Concert Hall on the campus of UNLV. Don't miss Atlantic Records recording artists Troup with special guest star - the beautiful, the sexy, Miss Tyler Collins. Ladies and gentlemen, treat yourself to a night of total entertainment inside the Artumus Ham Concert Hall. Sunday night May 13th - 7 PM - It's Troup and Tyler Collins. Tickets on sale now at the Artumus Ham Box Office, and all Ticketron locations. This is another Michael Scivo Presents in conjunction with your rhythm radio, FM 88.

7. **Jim Weaver - Fletcher Jones Chevrolet, Geo, and Isuzu**

Funding for this portion of FM 88's programming is being made possible by an underwriting grant from Jim Weaver at Fletcher Jones Chevrolet, Geo, and Isuzu. Jim Weaver offers the first time buyer's plan and preferred financing on all new and used cars. Fletcher Jones Chevrolet, Geo and Isuzu is located at 444 South Decatur Boulevard at Alta. Jim Weaver announces the arrival of the new 1991 model Chevrolet Caprice Classic, the Isuzu Impulse, and the 4 door Chevy Blazer 4 by 4. The phone number at Fletcher Jones Chevrolet, Geo and Isuzu is 870-9444. Jim Weaver is another long-time proud supporter of rhythm radio, FM 88.

8. **Jockey Club - Exquisite Impressions**

Join Exquisite Impressions and FM 88 for another Saturday night party April 28th beginning at 10 PM and lasting until . . . on the second floor of the Jockey Club overlooking the fabulous Las Vegas Strip. You must be 21 or over with proper ID and fashionable attire is a must. We're looking for the mature crowd. Also ladies, by arriving before midnight you will enter free. Yes, I said free! With the music being provided by the Wizard WC and your MC, FM 88's Greg Spin. Inside of the all new Turf Lounge of the Jockey Club. Parts of proceeds will benefit rhythm radio, FM 88.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

NYNEX Mobile Services File No. 861733
for Public Coast Station KLU786
Sag Harbor, New York

MEMORANDUM OPINION AND ORDER

Adopted: April 5, 1991; Released: April 12, 1991

By the Chief, Private Radio Bureau:

I. INTRODUCTION

1. Niagara Communications, Inc. (Niagara), filed a petition opposing the application filed by NYNEX Mobile Services Company (NMSC) to renew the above captioned public coast station license. NMSC filed an opposition and Niagara filed a reply. For reasons discussed below, we find that the petition raises no substantial and material questions concerning the qualifications of NMSC. Therefore, we will dismiss the petition and process NMSC's application.

II. DISCUSSION

2. On October 18, 1989, NMSC filed a timely application to renew the radio station license for its public coast station located at Sag Harbor, New York, call sign KLU786 (Sag Harbor). On November 28, 1989, Niagara filed an "Informal Petition to Deny" the application of NMSC, alleging harmful interference caused by the Sag Harbor station to Niagara's public coast station located at Providence, Rhode Island, call sign KTR948. On December 8, 1989. NMSC filed an "Opposition to the Informal Petition to Deny," responding to the November 28, 1989, pleading by Niagara. In turn, Niagara submitted an "Informal Reply to the Opposition of our Petition to Deny as filed by NYNEX (NMSC)," dated December 18, 1989.

3. On December 18, 1990, the Chief, Aviation and Marine Branch, Special Services Division, Private Radio Bureau, notified Niagara that their "Informal Petition to Deny" lacked "specific allegations of fact, supported by affidavit of a person or persons with personal knowledge thereof," pursuant to the requirements set forth in Section 309 of the Communications Act, 47 U.S.C. § 309. The December 18, 1990, letter gave Niagara the opportunity to provide the Commission with the necessary affidavit supporting its allegations within thirty (30) days. Niagara did not respond. Additionally, the Chief, Aviation and Marine Branch requested that the Commission's Field Operations Bureau investigate Niagara's claim of an improperly mounted antenna at NYNEX's Sag Harbor station. On December, 16, 1990, the New York field office inspected the station and reported that the subject antenna was directed away from the Providence, Rhode Island station operated by Niagara.

III. DECISION

4. In view of the discussion above, we find that Niagara's petition raises no substantial and material questions concerning the qualifications of NMSC to renew the license for KLU786 in Sag Harbor, New York. NMSC's pending application will therefore be processed in the normal course of business.

5. Accordingly, IT IS ORDERED that, pursuant to Section 309(d)(2) of the Communications Act, 47 U.S.C. § 309(d)(2), the Informal Petition to Deny NMSC's application to renew its license for Public Coast Station KLU786 IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ralph A. Haller
Chief, Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-473

In the Matter of

Amendment of Section 73.202(b),	RM-6388
Table of Allotments,	
FM Broadcast Stations.	
(Prescott Valley, Arizona)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 15, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 3 FCC Rcd 5805 (1988), issued in response to a petition for rule making filed on behalf of Lucky Communications, Inc. ("petitioner"),[1] proposing the allotment of FM Channel 252C2 to Prescott Valley as that community's second local FM service. Petitioner filed supporting comments in response to the *Notice*. William D. Taylor also filed comments.[2] Prescott Valley Broadcasting, Inc. ("PVBC") filed comments and a counterproposal. [3]

2. Although petitioner generally supports the *Notice*, it objects to the 6.5 kilometer northeast site restriction proposed therein, and requests that the channel be allotted without a site restriction. According to petitioner, this restriction would require the placement of a transmitter for a station on Channel 252C2 in a canyon below Prescott Valley, and, therefore, the requirements of Section 73.315 of the Commission's Rules requiring line-of-site service could not be met. Moreover, petitioner advises that the restriction placed on Channel 252C2 in the *Notice* was required to avoid short-spacing to a proposal to allot Channel 251A to Seligman, Arizona. We note that Channel 277A was allotted to Seligman instead of Channel 251A in MM Docket No. 88-449, 4 FCC Rcd 6922 (1989). Therefore, a site restriction on Channel 252C2 at Prescott Valley is unnecessary.

3. Channel 252C2 can be allotted to Prescott Valley consistent with the minimum distance separation requirements of the Commission's Rules without the imposition of a site restriction, as indicated above.[4] Additionally, since Prescott Valley is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government was obtained.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Prescott Valley, Arizona	252C2,294C2

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to Payne-Prescott Broadcasting Company, 909 Relation Street, Safford, Arizona 85545.

6. The window period for filing applications on Channel 252C2 at Prescott Valley, Arizona, will open on **May 31, 1991,** and close on **July 1, 1991.**

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner is the licensee of daytime-only AM station KLKY, Prescott Valley, Arizona.

[2] Taylor's comments were not accompanied by a certificate of service. Thus, they constitute an *ex parte* filing and will not be considered. *See* Section 1.420(a) of the Commission's Rules.

[3] PVBC's counterproposal is procedurally and substantively defective. PVBC failed to serve a copy of its comments and counterproposal on the petitioner's counsel, as required by Section 1.420 of the Commission's Rules and paragraph 4 of the Appendix to the *Notice*. Moreover, the counterproposal failed to include a technical study to demonstrate compliance with the Commission's Rules. Therefore, the counterproposal will not be considered. Petitioner's response thereto is thus moot and will not be considered.

[4] Coordinates used for Channel 252C2 at Prescott Valley are 34-36-36 and 112-18-54.

[5] The *Notice* stated that the Prescott Valley proposal was made contingent upon the grant of a license to Station KNOT-FM, Prescott, Arizona, to operate on Channel 256C. We note that pursuant to Docket No. 84-512, 51 Fed. Reg. 11915, April 8, 1986, the FM Table of Allotments was amended effective May 7, 1986 to reflect Channel 256C in lieu of Channel 252A at Prescott. Payne-Prescott Broadcasting Company, the licensee of Station KNOT-FM, filed an application for Channel 256C (File No. BPH-860709IC). As a result, Station KNOT-FM is no longer entitled to protection for Channel 252A at Prescott. *See Plainview, TX*, 4 FCC Rcd 8788 (1989). We believe that public interest considerations justify resolving this proceeding in order to provide a second local FM broadcast service to the residents of Prescott Valley. As a result of our determination, we will serve Station KNOT-FM with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-615

In the Matter of

Amendment of Section 73.202(b), RM-7552
Table of Allotments,
FM Broadcast Stations.
(Adams, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7595 (1990), issued in response to a petition filed by Karle Roekle ("petitioner"). The *Notice* proposed the allotment of Channel 291A to Adams, Wisconsin, as that community's first local broadcast service. Late filed comments in support of the allotment were submitted by petitioner and Jeffrey A. Smith.[1]

2. We believe the public interest would be served by the allotment of Channel 291A to Adams, Wisconsin, since it would provide the community with its first local broadcast service. Channel 291A can be allotted to Adams in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[2]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Adams, Wisconsin	291A

4. The window period for filing applications will open on **May 31, 1991,** and close on **July 1, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The comments submitted by petitioner and Jeffrey A. Smith were received after the cut-off date established in this proceeding and were not accompanied by a motion to accept. However, because this proceeding is uncontested, we will accept the comments for the purpose of allotting a first local service to Adams.

[2] The coordinates for Channel 291A are 43-57-06 and 89-49-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-593

In the Matter of

Amendment of Section 73.202(b), RM-7538
Table of Allotments,
FM Broadcast Stations.
(Boyne City, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7278 (1990), proposing the substitution of FM Channel 228C2 for Channel 228A at Boyne City, Michigan, and modification of the license for Station WCLX(FM) to specify the new channel. The *Notice* was issued in response to a petition filed by Biederman Investments, Inc. ("petitioner"). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 228C2 for Channel 228A at Boyne City, thereby providing the community with enhanced FM broadcast service. As indicated in the *Notice*, Channel 228C2 can be allotted to Boyne City, Michigan, consistent with the Commission's spacing requirements at petitioner's specified site, 7.7 kilometers (4.8 miles) southwest of the community.[1] Issuance of a license for Channel 228C2 may be withheld, however, until Station WNBY-FM, Newberry, Michigan, is licensed on Channel 229C2 in accordance with MM Docket No. 87-262.[2] Since Boyne City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. We have authorized a modification of petitioner's license for Station WCLX(FM), Boyne City, to specify operation on Channel 228C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Boyne City, Michigan	228C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station WCLX(FM), Boyne City, Michigan, IS MODIFIED to specify operation on Channel 228C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested to the following: Jack St. Andre, Station WNBY-FM, P. O. Box 501, Newberry, Michigan 49868.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 228C2 are 45-10-44 and 85-05-42.

[2] The construction permit for Channel 229C2 at Newberry, Michigan, was granted on February 21, 1989 (BPH-880804ID).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-109

In the Matter of

Amendment of Section 73.202(b), RM-7646
Table of Allotments,
FM Broadcast Stations.
(Natchitoches, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 1, 1991; Released: April 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Cane River Communications, Inc. ("petitioner"), licensee of Station KDBH(FM), Channel 249A, Natchitoches, Louisiana, requesting the substitution of Channel 247C3 for Channel 249A at Natchitoches, and the modification of Station KDBH(FM)'s license to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 247C3, if allotted to Natchitoches.

2. We believe the public interest would be served by proposing the substitution of Channel 247C3 for Channel 249A at Natchitoches, Louisiana, since it could enable Station KDBH(FM) to expand its coverage area. Channel 247C3 can be allotted to Natchitoches in compliance with the Commission's minimum distance separation requirements at petitioner's present transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KDBH(FM) to specify operation on the higher powered channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 247C3 at Natchitoches or require the petitioner to demonstrate the availability of an additional equivalent class channel.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Natchitoches, Louisiana	240A, 249A	240A, 247C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 6, 1991,** and reply comments on or before **June 21, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bruce A. Eisen, Esq.
Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 247C3 at Natchitoches are North Latitude 31-45-47 and West Longitude 93-03-47.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-470

In the Matter of

Amendment of Section 73.202(b), RM-5960
Table of Allotments,
FM Broadcast Stations.
(Marlette, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 16, 1991

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 2 FCC Rcd 6658 (1987), proposing the allotment of FM Channel 223A to Marlette, Michigan, as that community's first FM service. The *Notice* was issued in response to a petition filed by D. J. Fox ("petitioner"). Petitioner filed supporting comments reaffirming his intention to apply for the channel. Thumb Broadcasting, Inc., licensee of Station WLEW-AM/FM, Bad Axe, Michigan, filed supporting comments. Robert Armstrong filed a Petition to File Delayed Comments, Petition to Request an Inquiry and Petition to Dismiss Request for Allotment.[1]

2. We believe the public interest would be served by the allotment of FM Channel 223A to Marlette, Michigan, as that community's first FM broadcast service. Channel 223A can be allotted to Marlette, consistent with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 9.4 kilometers (5.8 miles) southeast of the community.[2] The site restriction will prevent a conflict with Station WDZZ-FM, Channel 224A, Flint, Michigan. Since Marlette is located within 320 kilometers of the U.S.-Canadian border, concurrence of the Canadian government has been obtained.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Marlette, Michigan	223A

4. The window period for filing applications will open on **May 31, 1991,** and close on **July 1, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] These comments were not filed in accordance with the requirements of Section 1.415. Although the filing was not accepted in this rule making, the comments have been referred to the Commission's Enforcement Division for review.

[2] The coordinates for Channel 223A at Marlette are 43-16-37 and 82-59-18. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Stations WMXD-FM, Channel 222B, Detroit Michigan, and WDZZ-FM, Channel 224A, Flint, Michigan.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-650

In the Matter of

Amendment of Section 73.202(b), RM-7545
Table of Allotments,
FM Broadcast Stations.
(Augusta, Kansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 15, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 155 (1991), proposing the substitution of FM Channel 283C2 for Channel 283A at Augusta, Kansas, and modification of the construction permit for Channel 283A to specify operation on Channel 283C2. The *Notice* was issued in response to a petition filed by Gregory Ray Steckline ("petitioner"), permittee of Channel 283A, Augusta.[1] Fred Hannel, d/b/a Trident Broadcasting of Kansas ("Hannel"), filed a petition for rule making mutually exclusive with petitioner's proposal. Hannel's petition is unacceptable for consideration.[2]

2. We believe the public interest would be served by substituting Channel 283C2 for Channel 283A at Augusta, Kansas, in order to provide that community with a wide area FM broadcast service. Channel 283C2 can be allotted to Augusta consistent with the Commission's spacing requirements at petitioner's specified site 13 kilometers (8.1 miles) north of the community. [3] We will authorize a modification of petitioner's construction permit for Channel 283A, Augusta, Kansas, to specify operation on Channel 283C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, and 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 30, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Augusta, Kansas	283C2

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 283A, Augusta, Kansas, IS MODIFIED to specify operation on Channel 283C2 in lieu of Channel 283A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the petition for rule making filed by Fred Hannel, d/b/a Trident Broadcasting of Kansas, IS DISMISSED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner was granted a construction permit (BPH-880727MO) in MM Docket No. 90-292, FCC 90M-3230, released October 15, 1990. The construction permit was issued on March 18, 1991.

[2] Hannel filed a rule making petition on January 22, 1991, requesting the allotment of Channel 283C2 to Peabody, Kansas, and substitution of Channel 263A for Channel 283A at Augusta, Kansas. Although timely filed, Hannel's petition is procedurally defective. Hannel's proposal would require petitioner to change channels and, therefore, petitioner would be entitled to reimbursement for the reasonable costs involved in changing frequency. *See Circleville, Ohio*, 8 FCC 2d 159 (1967), and *Dickerson, Tennessee and Benton and Calvert City, Kentucky*, 4 FCC Rcd 8707 (1989). Hannel did not state that he would reimburse petitioner. Furthermore, Hannel proposes the allotment of Channel 263A at Augusta at coordinates 37-38-46 and 96-59-01, which are different than the coordinates specified in petitioner's construction permit (37-48-13 and 96-57-04). A staff engineering analysis shows that Channel 263A at petitioner's construction site is short spaced to Station KDVV, Channel 262C, Topeka, Kansas. Absent a statement from the permittee or licensee, the Commission will not order the relocation of a transmitter site to accommodate another facility. Therefore, we will dismiss Hannel's proposal. Accordingly, Hannel's and petitioner's reply comments are moot.

[3] The coordinates for Channel 283C2 are 37-48-11 and 96-57-24. The *Notice* specified a site 11.4 kilometers (7 miles) northeast of Augusta to avoid a short spacing to a counter-proposal to add Channel 230C2 at Andover, Kansas, in MM Docket No. 89-429. However, the Andover proposal is for a C3 channel and not a C2 channel. This correction allows petitioner to use the site specified in his petition.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-81

In re Applications of

HUBBARD BROADCASTING, INC. (hereafter "Hubbard")	File No. BPH-891006MP
NUEVA MANANA BROADCASTING CORPORATION (hereafter "Nueva")	File No. BPH-891006MS
RICHARD MUZZY (hereafter "Muzzy")	File No. BPH-891006MY
JAMES ARTHUR BUNDY (hereafter "Bundy")	File No. BPH-891006NA
TIERRA DEL SOL BROADCASTING, INC. (hereafter "Tierra")	File No. BPH-891006NE
KCMN, INC. (hereafter "KCMN")	File No. BPH-891006NF
DRS. PATRICIA L. AND RONALD A. JOHNSON (hereafter "Johnson")	File No. BPH-891006NH
FREEMAN HARRIS (hereafter "Harris")	File No. BPH-891006NI

For Construction Permit
for a New FM Station on
Channel 241A (96.1 MHz)
in Fountain, Colorado

HEARING DESIGNATION ORDER

Adopted: March 26, 1991; Released: April 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters.* Johnson has filed petitions to dismiss the applications of Hubbard, Nueva, Muzzy, Bundy, Tierra, KCMN, and Harris. Johnson's petitions allege that the applicants' failure to provide the most current legal boundaries for the community of license on their coverage contour maps constitutes a tenderability defect as set forth in Appendix D to the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1984). Appendix D states that the failure to provide *any* legible boundaries for the community of license is a tenderability defect warranting dismissal of the application. Appendix D does not state that failure to provide the most *current* legal boundaries for the community of license will result in an application's return. Additionally, the coverage contour maps provided by both the applicants and the petitioner reveal that these applicants will provide the requisite signal over the community of license as set forth in 47 C.F.R. § 73.315(a). Accordingly, Johnson's petitions will be denied with respect to this allegation.

3. Additionally, Johnson's petitions raise other issues with respect to the applications of Hubbard, Muzzy, Bundy, KCMN, and Harris. The allegations made by Johnson against these applicants will be discussed below.

4. *Hubbard.* On June 26, 1990, Johnson filed a petition to dismiss the application of Hubbard to which Hubbard has filed an opposition and Johnson a reply. The petition alleges that, in response to Item 19 of Section V-B, FCC Form 301, Hubbard does not provide correct engineering data for the radial running through the principle community. The radial listed on Hubbard's exhibit is at 129 degrees; Johnson contends that the correct bearing of the radial through Fountain should be 116 degrees. Consequently, Johnson contends, both the height above average terrain of the Fountain radial and the distance to the contours are listed incorrectly. Secondly, Johnson submits that Hubbard does not provide the exact location of its proposed antenna as required by Item 2a of Section V-B, FCC Form 301. Consequently, Johnson believes that the application should be dismissed.

5. While Item 19, Section V-B of FCC Form 301 requests engineering data on a radial through the principal community, there is no requirement that the radial selected pass through the reference coordinates of the community of license. The only requirement is that the radial pass through the principal community. Hubbard has properly responded to the question with its selection of the 129 degree radial. Furthermore, an engineering analysis of Hubbard's application confirms the height above average terrain for the 129 degree true radial as provided by the applicant, as well as the distances to the contours.

6. Finally, the antenna site of Cheyenne Mountain specified by Hubbard is easily recognized as the site of several existing radio towers. Accordingly, the detailed information Johnson contends is mandated by FCC Form 301 is actually unnecessary for the Commission staff to determine the location of Hubbard's antenna. Therefore, Johnson's petition to dismiss will be denied.

7. *Muzzy.* Johnson has filed a petition to dismiss the application of Muzzy. Johnson argues that Muzzy has failed to provide an answer to Item 2, Section 1 of FCC Form 301 to indicate whether the application is for an AM, FM, or TV broadcast station. Appendix D of MM Docket 84-750, *Report and Order*, *supra*, set forth the items of FCC Form 301 which must be properly completed in order for an application to be considered substantially complete. The item questioned by Johnson is not among those listed. Furthermore, Muzzy has provided the FM channel number and FM frequency for which he is applying in both Sections I and V-B. Accordingly, Johnson's petition will be denied.

8. *Bundy*. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicant have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Bundy would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

9. Johnson has filed a petition to dismiss the application of Bundy. Johnson argues that the transmitter site proposed by Bundy is immediately adjacent to the Fort Carson Military Reservation and cannot be constructed without encroaching on the Reservation. Johnson also alleges that Bundy has failed to comply with the Commission's local public notice rule, 47 C.F.R. § 73.3580.

10. Johnson's allegations with respect to Bundy's tower and failure to comply with local public notice requirements are essentially attempts to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in this part of Johnson's petition have not been considered. Accordingly, an opportunity to raise any allegations therein will be afforded Johnson post-designation pursuant to 47 C.F.R. § 1.229.

11. *Tierra*. Cathy Valdez Bogren, President, Director and 50% owner of Tierra, is employed as a Business Manager at Station KILO(FM), Colorado Springs, Colorado. Richard S. Bogren, also an officer, Director and 50% owner of the applicant, is employed as a General Manager at Station KKMG(FM), Pueblo, Colorado. Although the Fountain proposal does not violate 47 C.F.R. Section 73.3555, (Multiple Ownership Rule), it may contravene the Commission's Cross-Interest Policy. However, Tierra has represented to the Commission that the Bogrens will resign from their respective positions if Tierra is the successful applicant in this proceeding. Accordingly, in the event that a construction permit is awarded to Tierra in this proceeding, Cathy and Roderick Bogren will be required to sever all connections with stations KILO(FM), Colorado Springs, CO, and KKMG(FM), Pueblo, CO.

12. *KCMN*. Johnson has filed a petition to dismiss the application of KCMN. The applicant proposes to mount its antenna on the tower occupied by KRCC, Colorado Springs, Colorado. Johnson alleges that KCMN has incorrectly shown the site elevation of this tower to be 2874 meters AMSL when Commission records for KRCC show the correct AMSL to be 2876 meters. We have confirmed that the correct site elevation for this tower is 2876 meters. However, this minor discrepancy does not render KCMN's application either unacceptable for tender or unacceptable for filing. Accordingly, Johnson's petition will be denied. Nevertheless, in accordance with longstanding Commission policy, we will require KCMN to file an amendment which rectifies the discrepancy noted by Johnson with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. Exhibit E-IB-FM to KCMN's proposal deals with potential interference to other facilities. Our study reveals that KCMN's statement fails to adequately address the potential for receiver-induced intermodulation interference. Accordingly, KCMN will be required to investigate this matter and to submit as an amendment, a statement as requested by Item 14, Section V-B, FCC Form 301, specifically accepting full responsibility for the elimination of any objectionable interference, including that caused by receiver-induced or other types of modulation, to the presiding Administrative Law Judge within 30 days after this Order is released.

14. *Harris*. Johnson has filed a petition to deny the application of Harris, to which Harris has filed an opposition and Johnson a reply. Johnson's petition alleges that Harris has failed to provide relevant engineering data for the radial running through the principle community to be served as required by Item 19 of Section V-B, FCC Form 301. Section V-B, Item 19 of FCC Form 301 requires that an applicant provide engineering data on a radial through the principal community, if this radial is not already one of the major radials to be provided. While Harris has failed to provide the requested information, this minor defect does not render the application either untenderable or unacceptable for filing. Accordingly, Johnson's petition will be denied. Nevertheless, we will require Harris to provide an amendment to remedy the defect within 30 days of the release of this Order.

15. *Other Matters*. All of the applications in this proceeding currently conflict with Channel 243, Colorado Springs, now authorized to station KKFM. However, upon completion of the on-going proceeding to grant a construction permit to an applicant for Evergreen, Colorado on Channel 243C, KKFM has been ordered to change frequencies and commence operation on Channel 251. *See, Report and Order* in BC Docket 81-819, 47 Fed. Reg. 22536, published May 25, 1982, and *Order* in MM Docket No. 84-397 et al., FCC 90I-124, released November 27, 1990. Accordingly, we will designate the applications for Fountain, Colorado for hearing. However, program test authority in the Fountain proceeding will be withheld until KKFM has commenced operation on Channel 251.

16. Hubbard and Harris each propose to sidemount its antenna on an existing tower. Our engineering study indicates that each proposal may significantly exceed the ANSI guidelines for human exposure to radio frequency (RF) radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned that Hubbard and Harris each may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under the rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.1307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of RF radiation exceeding specific standards. Since the proposals may each have a significant environmental impact as defined by 47 C.F.R. § 1.1307, Hubbard and Harris each will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. This study must include the effects of the proposed operation and all nearby RF sources. In this regard, if the site is presently fenced in compliance with the guidelines, the applicant is required to so state and give the distance from the base of the tower to the fence. Accordingly, Hubbard and Harris each will be required to file, within 30 days of the release of this Order, an EA with the presiding Ad-

ministrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980). In the event the Mass Media Bureau determines, based on its analysis of the Hubbard and Harris Environmental Assessments, that either the Hubbard or the Harris proposal will not have a significant impact upon the quality of the human environment, the contingent environmental issue shall be deleted, and the Presiding Judge shall thereafter not consider the environmental effects of the proposals. *See*, Section 1.1308(d) of the Commission's Rules.

17. Hubbard petitioned for leave to amend its application on June 29, and July 13, 1990. KCMN petitioned for leave to amend its application on February 20, 1991. Harris petitioned for leave to amend his application on November 6, 1990. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

18. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Bundy would constitute a hazard to air navigation.

2. If a final environmental impact statement is issued with respect to Hubbard or Harris in which it is concluded that the proposed facility is likely to have an adverse effect on the quality of the environment, to determine whether the proposal is consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

21. IT IS FURTHER ORDERED, That, in light of the above discussion, the petitions to dismiss filed by Johnson with respect to the applications of Hubbard, Nueva, Muzzy, Bundy, Tierra, KCMN, and Harris ARE DENIED.

22. IT IS FURTHER ORDERED, That, in the event of grant of Tierra's application, Cathy and Roderick Bogren will sever all connections with stations KILO(FM), Colorado Springs, CO, and KKMG(FM), Pueblo, CO, prior to the commencement of program test authority.

23. IT IS FURTHER ORDERED, That KCMN shall file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which specifies the correct site elevation for its proposed tower site as set forth in paragraph 12, above.

24. IT IS FURTHER ORDERED, That KCMN shall file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order accepting full responsibility for the elimination of any objectionable interference, including that cause by receiver-induced or other types of modulation.

25. IT IS FURTHER ORDERED, That Harris will file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order which contains the information required by Item 19, Section V-B, FCC Form 301 for the radial over the community of Fountain, Colorado.

26. IT IS FURTHER ORDERED, That the program test authority in this proceeding will be withheld until station KKFM, Evergreen, Colorado has commenced operation on Channel 251 pursuant to Docket 81-819.

27. IT IS FURTHER ORDERED, That in accordance with paragraph 16, hereinabove, Hubbard and Harris shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

28. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

29. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Hubbard, KCMN and Harris ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

30. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

31. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

32. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-21

In the Matter of

Amendment of Section 73.202(b),	RM-7126
Table of Allotments,	
FM Broadcast Stations.	
(Beaumont, California)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 625 (1990), issued in response to a petition filed on behalf of Eastland Broadcasting Corp. ("petitioner") proposing the allotment of Channel 265A to Beaumont, California, as that community's first local broadcast service. Petitioner, BeauCal Broadcasting Associates, and the University of Southern California each filed supporting comments. No other comments were received.

2. We believe the public interest would be served by allotting Channel 265A to Beaumont since it could provide a first local broadcast service to the community. Channel 265A can be allotted to Beaumont in conformity with the minimum distance separation requirements of the Commission's Rules without the imposition of a site restriction.[1,2] Additionally, since Beaumont is located within 320 kilometers (199 miles) of the Mexican border, concurrence of the Mexican government was received. [3]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED to include the community listed below, as follows:

City	Channel No.
Beaumont, California	265A

4. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Order* by Certified Mail, Return Receipt Requested, to KPSI Radio Corporation, Radio Station KPSI-FM, 2100 E. Tahquitz-McCallum Way, Palm Springs, California 92262.

5. The window period for filing applications on Channel 265A at Beaumont, California, will open on **June 3, 1991,** and close on **July 3, 1991.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. Questions related to the window application filing process should be addressed to the Audio Services Division, FM Branch, Mass Media Bureau, (202) 632-0394.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates used for Channel 265A at Beaumont are 33-56-06 and 116-58-24.

[2] Because this allotment results from a petition filed prior to October 2, 1989, applicants for Channel 265A at Beaumont may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station KRTH-FM, Channel 266B, Los Angeles, California, at coordinates 34-13-38 and 118-04-00, as well as to Station KATY-FM, Channel 267A, Idyllwild, California, at coordinates 33-46-05 and 116-44-01.

[3] Although the *Notice* stated that the Beaumont proposal was made contingent upon the grant of a license to cover the construction permit issued to Station KPSI-FM on Channel 263B1, Palm Springs, California, we note that pursuant to MM Docket No. 87-302, 3 FCC Rcd 4831 (1988), the FM Table of Allotments was amended effective September 23, 1988 to reflect Channel 263B1 in lieu of Channel 265A at Palm Springs. Since KPSI Radio Corporation ("KPSI Radio") holds the construction permit for Station KPSI-FM on Channel 263B1, it is no longer entitled to protection for Channel 265A at Palm Springs. *See Plainview, Texas*, 4 FCC Rcd 8788 (1989). Moreover, since the construction permit for Station KPSI-FM is not in conflict with the Beaumont proposal, we believe that public interest considerations dictate resolving this proceeding in order to provide a first local broadcast service to the residents of that community. As a result of our determination, we will serve Station KPSI-FM with a copy of this *Report and Order*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-48

In the Matter of

Amendment of Section 73.202(b),	RM-5772
Table of Allotments,	RM-5941
FM Broadcast Stations	RM-6533
(Arlington, McKinney,	RM-6534
Celina, Terrell, Daingerfield,	RM-6535
College Station, Caldwell,	RM-6536
Howe, Texas, and Durant,	
Oklahoma.)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: April 3, 1991; Released: April 17, 1991

By the Commission:

1. The Commission has before it an Application for Review filed by Roy E. Henderson ("Henderson") directed to the *Report and Order* in this proceeding, 5 FCC Rcd 2660 (MM Bur. 1990).[1] Hicks Broadcasting Corporation ("Hicks") filed an Opposition to Application for Review. Henderson filed a Reply to the Opposition. For the reasons discussed below, we deny the Application for Review.[2]

BACKGROUND

2. The *Report and Order* in this proceeding granted two upgrades of existing FM stations. Specifically, the *Report and Order* upgraded Station KHYI, Arlington, Texas, to Channel 235C, and Station KTSR, College Station, Texas, to Channel 297C3. To accommodate the Station KHYI upgrade at Arlington, it was also necessary for the *Report and Order* to substitute Channel 295A for Channel 237A at McKinney, Texas, and modify the license of Station KSSA to specify operation on Channel 295A. The *Report and Order* also allotted Channel 237A to Howe, Texas, as a new service. In order to take these actions, the *Report and Order* dismissed related allotment proposals in McKinney, Texas; Terrell, Texas; and Celina, Texas. [3]

3. The Application for Review is not directed against any of the actions noted in paragraph 2, *supra*. Rather, the Application for Review concerns the fact that the *Report and Order* did not consider a petition for rule making purportedly filed[4] by Henderson on April 8, 1988, proposing an upgrade of Channel 236C2 for Channel 236A at Caldwell, Texas.[5] In this connection, Henderson notes that his petition for rule making conflicted with the originally proposed Channel 235C2 upgrade by Station KTSR, College Station, Texas.[6] Henderson argues that, consistent with routine allotment processing procedures, his rule making petition should have been consolidated into this proceeding as a counterproposal.[7] Furthermore, in view of the fact that Station KTSR was upgraded to Channel 297C3 instead of the originally proposed Channnel 235C2, Henderson states that there is no longer any impediment to grant of his proposed upgrade at Caldwell, Texas. As a consequence, Henderson contends that his upgrade should have been granted in this proceeding.

4. Hicks is the licensee of Station KTSR, College Station, Texas. In its opposition, Hicks argues that there was no basis to either consider or grant the upgrade proposal at Caldwell. In support of this argument, Hicks states that Henderson was not a permittee at the time he filed his petition and, therefore, was ineligible to request such an upgrade. Also, Hicks contends that the site restriction necessary to accommodate a Channel 236C2 allotment at Caldwell precludes compliance with the principal city coverage requirement set forth in Section 73.315 of the Rules. Finally, Hicks notes that the staff could not have granted the Caldwell upgrade without putting the proposal on Public Notice and subjecting it to public comment.

5. In his reply, Henderson asserts that he was eligible to request the upgrade at Caldwell because his application for the Channel 236A allotment had been cut-off and he had entered into a settlement agreement with the competing applicant. Henderson also claims that the public was afforded sufficient notice of its proposed upgrade because the Public Notice referencing Hicks' counterproposal called for the substitution of an alternative Class A FM channel for Caldwell.

DISCUSSION

6. We deny the Application for Review for two reasons. First, the petition for rule making was not in compliance with our minimum spacing requirements. Using the proposed coordinates set forth in that petition (30-47-18 and 96-38-06), the Channel 236C2 proposal at Caldwell would have been short-spaced to Station KNFO, Channel 238C, Waco, Texas, and a proposed Channel 235A allotment at Huntsville, Texas. Second, Henderson was not a permittee when he purportedly filed his petition for rule making on April 8, 1988.[8] Therefore, he was ineligible to request an upgrade pursuant to Section 1.420(g)(3) of the Rules. *See Lafayette, Louisiana*, 4 FCC Rcd 5073 (1989); *see also Santa Margarita, California*, 2 FCC Rcd 6930 (1987). We also reject the argument that Henderson was eligible to request the upgrade at Caldwell because he had entered into a settlement agreement with the other applicant for the Channel 236A allotment at Caldwell. There is nothing in *Modification of FM and Television Station License to Higher Class Co - Channel and Adjacent Channels*, 60 RR 2d 114 (1986), adopting Section 1.420(g)(3), which would suggest that an applicant in this posture could be considered a permittee and therefore eligible to request such an upgrade. In view of the fact that Henderson was ineligible to file his petition for rule making by the April 21, 1988, comment date in this proceeding, there was no basis to consider that petition in this proceeding.

7. Accordingly, IT IS ORDERED, That the aforementioned Application for Review filed by Roy E. Henderson directed against the *Report and Order* in this proceeding IS DENIED.

8. IT IS FURTHER ORDERED, That the aforementioned Application for Review filed by Roy E. Henderson directed against the *Memorandum Opinion and Order* granting a Motion to Sever IS HEREBY DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Roy E. Henderson is the permittee of Station KHEN, Channel 236A, Caldwell, Texas.

[2] In a related matter, the staff granted a Motion to Sever filed by Evergreen Media Corporation of Dallas, licensee of Station KHYI, Arlington, Texas, requesting that its upgrade granted in this proceeding be severed in order to permit implementation of the upgrade. *See Memorandum Opinion and Order*, 6 FCC Rcd 142 (MM Bur. 1991). Under Section 1.420(f) of the Rules, the filing of the Application for Review by Henderson automatically stayed the effectiveness of the KHYI upgrade pending final resolution of the Application for Review. Henderson also filed an Application for Review against the action granting the Motion to Sever. However, in view of the action herein denying the Application for Review directed to the *Report and Order*, we are dismissing, as moot, the Application for Review directed against the Motion to Sever.

[3] In a *Second Report and Order* in MM Docket No. 88-48, the staff upgraded Station KLBC-FM, Durant, Oklahoma, to Channel 296C2. 5 FCC Rcd 5534 (MM Bur. 1990).

[4] There was no Commission record of the filing of this petition for rule making prior to May 9, 1988. Accordingly, Henderson's attorney retendered the petition on May 9, 1988, at the request of the Commission's staff. While there may be some question as to whether the retendered petition establishes an April 8, 1988, filing date, it is not necessary to resolve this matter for the reasons discussed in paragraph 6, *infra*.

5 Section 1.420(g)(3) of the Commission's Rules provides for a procedure whereby the license or construction permit of an FM station may be modified to a mutually exclusive higher class channel in the course of an allotment rule making proceeding. Such "upgrade" proposals may be submitted as either a petition for rule making or as a timely counterproposal in an ongoing rule making proceeding.

[6] As indicated above, the *Report and Order* removed this conflict by upgrading Station KTSR to Channel 297C3.

[7] To be considered in this proceeding, a proposal, either in the form of a counterproposal or a separate petition for rule making, must have been filed by the April 21, 1988, comment date in this proceeding. *See* Section 1.420(d) of the Rules.

[8] At that time, Henderson had merely entered into a settlement agreement with the other applicant for the Channel 236A allotment at Caldwell, Texas. He did not become permittee of Station KHEN until December 16, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-458

In the Matter of

Amendment of Section 73.202(b), RM-7475
Table of Allotments,
FM Broadcast Stations.
(Taos, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. At the request of Taos County Radio ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6188 (1990), proposing the substitution of Channel 260C for Channel 260C2 at Taos, New Mexico, and the modification of Station KRBJ's construction permit to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 260C for Channel 260C2 at Taos since it could provide the community with an additional wide coverage area FM service, thereby enabling Station KRBJ to expand its service area. Channel 260C can be allotted to Taos in compliance with the Commission's minimum distance separation requirements with a site restriction of 28.6 kilometers (17.7 miles) south to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's construction permit for Station KRBJ to specify operation on Channel 260C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Taos, New Mexico	260C, 268C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Taos County Radio for Station KRBJ, Taos, New Mexico, IS MODIFIED to specify operation on Channel 260C, in lieu of Channel 260C2, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 260C at Taos are North Latitude 36-09-30 and West Longitude 105-29-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-110

In the Matter of

Amendment of Section 73.202(b), RM-7678
Table of Allotments,
FM Broadcast Stations.
(Hastings and Milford, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 1, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Bott Communications, Inc. ("petitioner"), requesting the reallotment of Channel 251C from Hastings to Milford, Nebraska, and the modification of Station KUHG(FM)'s construction permit to specify Milford as its community of license. Petitioner states that it will apply for Channel 251C, if allotted to Milford.

2. Petitioner states that Milford (population 2,108),[1] which is not located in an Urbanized Area, has no local aural transmission service. Hastings (population 23,045), on the other hand, presently receives local aural transmission service from one AM station, two commercial FM stations and one noncommercial educational FM station. In addition, a construction permit has been issued for a second noncommercial educational FM station. Finally, petitioner states that the removal of Channel 251C from Hastings will not result in the creation of any unserved or underserved areas.

3. The proposal must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the Rules regarding protection to the Commission's monitoring station at Grand Island, Nebraska.

4. We believe the public interest would be served by proposing the reallotment of Channel 251C from Hastings to Milford because it could provide the community with its first local aural transmission service. The proposal would not deprive Hastings of its only local transmission service. Furthermore, the allotment of Channel 251C at Milford is mutually exclusive with its present allotment at Hastings because the communities are located approximately 68 kilometers apart instead of the required 290 kilometers for co-channel Class C allotments. Channel 251C can be allotted to Milford in compliance with the Commission's minimum distance separation requirements with a site restriction of 46.5 kilometers (28.9 miles) west to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify petitioner's construction permit for Station KUHG(FM) to specify Milford as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 251C at Milford or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Hastings, Nebraska	251C, 268C2	268C2
Milford, Nebraska	---	251C

6.The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **June 7, 1991,** and reply comments on or before **June 24, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Harry C. Martin, Esq.
Matthew H. McCormick, Esq.
Reddy, Begley & Martin
2033 M Street, N.W., Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceedings, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] The coordinates for Channel 251C at Milford are North Latitude 40-48-00 and West Longitude 97-36-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-525

In the Matter of

Amendment of Section 73.202(b), RM-7505
Table of Allotments,
FM Broadcast Stations.
(Creswell, Oregon)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 1, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. At the request of Jed Broadcasting Co. or Oregon, Ltd. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 6581 (1990), proposing the substitution of Channel 237C3 for Channel 237A at Creswell, Oregon, and the modification of Station KAVE's license to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C3 and for Channel 237A at Creswell because it could provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Creswell in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.3 kilometers (0.2 miles) east of the community to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's license for Station KAVE to specify operation on Channel 237C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Creswell, Oregon	237C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Jed Broadcasting Co. of Oregon, Ltd. for Station KAVE, Creswell, Oregon, IS MODIFIED to specify operation on Channel 237C3, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 237C3 at Creswell are North Latitude 43-55-09 and West Longitude 123-00-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-451

In the Matter of

Amendment of Section 73.202(b), RM-7237
Table of Allotments,
FM Broadcast Stations.
(Laramie, Wyoming)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 2, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6167 (1990), issued in response to a petition filed by Jay Lellman ("petitioner"), proposing the allotment of Channel 283C2 at Laramie, Wyoming as the community's fourth local FM service. Petitioner filed comments in support of the proposal restating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the allotment of Channel 283C2 to Laramie, Wyoming, since it could provide the community with its fourth local FM service. Channel 283C2 can be allotted to Laramie in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules with a site restriction of 0.9 kilometers (0.6 miles) north of the community to avoid a short-spacing to the construction permit of Station KQKS(FM), Channel 282C1, Longmont, Colorado.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 31, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Laramie, Wyoming	236C, 275C, 283C2, 288A

4. The window period for filing applications will open on **June 3, 1991,** and close on **July 3, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 283C2 at Laramie are North Latitude 41-19-09 and West Longitude 105-34-52.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-597

In the Matter of

Amendment of Section 73.202(b), RM-7357
Table of Allotments,
FM Broadcast Stations.
(Ingram, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 2, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. At the request of Richman Phipps ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7383 (1990), proposing the allotment of Channel 296A to Ingram, Texas, as that community's first local FM service. Petitioner subsequently filed a request for withdrawal of its petition for rule making.[1] No other expressions of interest were filed.

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, That the petition for rule making of Richman Phipps, seeking the allotment of Channel 296A to Ingram, Texas, (RM-7357) IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] In accordance with Section 1.420(j) of the Commission's Rules, petitioner states that it has not been paid or promised any consideration, directly or indirectly, in exchange for the withdrawal of its expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-520

In the Matter of

Amendment of Section 73.202(b), RM-6966
Table of Allotments,
FM Broadcast Stations.
(Levelland, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 2, 1991; Released: April 16, 1991

By the Chief, Allocations Branch:

1. At the request of KLVT Radio, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8233 (1989), proposing the allotment of Channel 253A to Levelland, Texas, as that community's second local FM service. Comments opposing the allotment were filed by Delbert L. Kirby ("Kirby") and Dean Kirkpatric. Petitioner filed comments stating its intention to apply for the new channel, if allotted. Kirby and petitioner filed reply comments. Subsequently, petitioner filed a motion to dismiss its petition for rule making.[1] No additional expressions of interest in the channel were filed.

2. In accordance with Commission policy, we will grant petitioner's request for withdrawal of its rule making proposal.

3. Accordingly, IT IS ORDERED, That the petition for rule making of KLVT Radio, Inc., seeking the allotment of Channel 253A to Levelland, Texas, (RM-6966) IS DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] Petitioner filed a supplement to its motion to dismiss stating that, in accordance with Section 1.420(j) of the Commission's Rules, it has not been paid or promised any consideration, directly or indirectly, in exchange for the withdrawal of its expression of interest.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Scandinavia Telephone Company
Badger Telecom, Inc.
Midway Telephone Company
Mt. Vernon Telephone Company
Eastcoast Telecom, Inc.

Requests for Waiver of
the Commission's Equal Access
Implementation Plan for Independent
Telephone Companies

MEMORANDUM OPINION AND ORDER

Adopted: March 29, 1991; Released: April 16, 1991

By the Chief, Common Carrier Bureau:

1. In this order we grant the petition for waiver of the Commission's equal access rules filed by five independent telephone companies (ITCs). In the *ITC Equal Access Order,*[1] the Commission required ITCs to convert their end offices to equal access only if certain conditions were present. That order also established a timetable for conversion under certain circumstances. Strict timetables for conversion had been imposed upon the Bell Operating Companies (BOCs) under the Modification of Final Judgment (MFJ),[2] and upon the GTE operating companies under the GTE Consent Decree.[3] The Commission recognized differences between the BOCs and ITCs with respect to the types of markets served, switching technologies employed, and financial resources available to undertake equal access conversion. Because of these differences, the Commission concluded that timetables of the type imposed upon the BOCs and the GTOCs would not be appropriate for the non-GTE ITCs.

2. Instead, the Commission required ITCs to convert end offices equipped with stored program controlled (SPC) switches within three years of a reasonable request for conversion to equal access by an interexchange carrier. The *ITC Equal Access Order* provided, however, that ITCs may seek a waiver of the Commission's rules if they "can demonstrate that such a timetable, or the provision of such access features, is not feasible at costs that clearly outweigh potential benefits to users of telecommunications services.[4]

3. In this order, we consider a petition for waiver of the equal access implementation requirements filed on January 7, 1991, by five independent telephone companies, Scandinavia Telephone Company (Scandinavia), Badger Telecom, Inc. (Badger), Midway Telephone Company (Midway), Mt. Vernon Telephone Company (Mt. Vernon), and Eastcoast Telecom, Inc. (Eastcoast). Each company received a request for equal access conversion from the same interexchange carrier, MCI Telecommunications Corporation (MCI). Pursuant to the Commission's rules, the companies are required to complete equal access conversion by March 15, 1991. The petitioners state that, for various reasons, they require additional time to implement equal access.

4. Scandinavia, Badger, and Midway request an additional five and one-half months, until September 1, 1991, to implement equal access. These companies state that their end offices are equipped with NEC switches, and that NEC will not develop the software upgrades necessary to convert these switches to equal access. The companies state that, rather than replacing each switch, they decided to provide "virtual" equal access by co-locating a new switch with an existing switch. The companies state that the necessary hardware will be available and deployed by September 1, 1991.

5. Mt. Vernon requests an additional twelve and one-half months, until April 1, 1992. Mt. Vernon states that software upgrades for its switch are not available, and that the most efficient means of providing equal access is to replace the switch. Mt. Vernon states that the new switch is scheduled to be installed during 1991.

6. Eastcoast requests an additional one and a half months, until May 1991. Eastcoast states that in 1988 it contacted the switch vendor about upgrading its switch to provide equal access. According to Eastcoast, the switch vendor had to develop new software for the switch. Eastcoast states that, although it formally ordered the new software in March of 1989, implementation was delayed because the switch vendor experienced system debugging problems.

7. Based on our review of the record, we conclude that the requested waivers are in the public interest. The petitioners have set forth specific circumstances justifying their request, and no one has opposed this waiver request.[5] In addition, MCI has agreed to the petitioners' proposed new completion dates for equal access conversion. We conclude that the companies have demonstrated that the timetables established by the Commission's rules are not feasible "except at costs that clearly outweigh potential benefits.[6]

8. Accordingly, IT IS ORDERED that the petition for waivers of the equal access implementation requirements are GRANTED to the extent described herein.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *MTS and WATS Market Structure,* CC Docket No. 78-72, Phase III Order, 100 FCC 2d 860 (1985) (*ITC Equal Access Order*).

[2] *United States v. American Tel. & Tel. Co.,* 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States,* 460 U.S. 1001 (1983).

[3] *United States v. GTE Corp.,* 603 F. Supp. 730 (D.D.C. 1984).

[4] *Id.* at para. 50.

[5] United States Telephone Association filed comments supporting the waiver requests.

[6] *See ITC Equal Access Order* at para. 50.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-103

In the Matter of

Amendment of Section 73.202(b),	RM-7466
Table of Allotments,	RM-7471
FM Broadcast Stations.	RM-7474
(Rochester, Minnesota,	
and Clear Lake and	
Osage, Iowa)	

NOTICE OF PROPOSED RULE MAKING
AND
ORDER TO SHOW CAUSE

Adopted: March 28, 1991; Released: April 17, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration are three separately filed and mutually exclusive petitions for rule making. The first proposal, filed by Faith Sound, Inc. ("Faith Sound"), requests the substitution of Channel 225A for noncommercial Channel *203 at Rochester, Minnesota, and modification of the construction permit for noncommercial educational Station KFSI-FM, Channel 203, Rochester, to specify operation on Channel *225A (RM-7466). Faith Sound requests that Channel 225A be reserved for noncommercial educational use. The second proposal, filed by Jay Lellman ("Lellman"), seeks the allotment of Channel 225A to Rochester as that community's fifth FM broadcast service (RM-7471). The third proposal, filed by Mad Hatter Broadcasting, Inc. ("Mad Hatter"), requests the substitution of Channel 279C3 for Channel 276A at Clear Lake, Iowa, and modification of the license for Station KLKK(FM), Channel 276A, Clear Lake, to specify operation on Channel 279C3. To accommodate Channel 279C3 at Clear Lake, Mad Hatter requests the substitution of Channel 225A for Channel 279A at Osage, Iowa, and modification of the license for Station KCZY, Channel 279A, Osage, to specify operation on Channel 225A (RM-7474).

2. In support of its request, Faith Sound states that substitution of Channel *225A for Channel *203 at Rochester would resolve a long standing dispute between itself and Midwest KAAL-TV Corporation ("Midwest"), licensee of Station KAAL-TV, Channel 6, Austin, Minnesota.[1] Faith Sound informs us that although a construction permit for a 7 kilowatt noncommercial educational station was authorized, its signal caused severe interference to existing Station KAAL-TV. According to Faith Sound, in May of 1981, the Commission ordered KFSI-FM to decrease its power from 7 kilowatts to 3.5 kilowatts. It claims that even at the reduced power, Station KFSI-FM still interferes with KAAL-TV's signal in Rochester. Faith Sound believes that adoption of its proposal would strongly serve the public interest by providing the residents of Rochester with quality over-the-air educational FM service and interference-free television broadcast service

3. Lellman proposes the allotment of Channel 225A to Rochester as that community's fifth FM broadcast service. Lellman provided information and an engineering study in support of his request. Lellman states that he will apply for the channel, if allotted.

4. Mad Hatter requests the substitution of Channel 279C3 for Channel 276A at Clear Lake to allow its station to serve a larger area and population. To accommodate Channel 279C3 at Clear Lake, Mad Hatter proposes the substitution of Channel 225A for Channel 279A at Osage, Iowa, and modification of the license for Station KCZY to specify the new channel.[2] In accordance with Commission policy, Mad Hatter has stated its willingness to reimburse Station KCZY for all prudent and reasonable expenses incurred in changing channels. Mad Hatter states that it will apply for Channel 279C3, if allotted.

5. A staff engineering analysis has determined that Channel *225A can be allotted to Rochester consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules at Faith Sound's proposed site. [3] Generally, noncommercial educational stations operate within the reserved portion of the FM band (Channels 201-220). However, exceptions have been made where channels in the noncommercial educational band are not available because of foreign allotments (Canadian or Mexican) or potential interference to operation on VHF Television Channel 6. Here, interference to Station KAAL-TV, Channel 6, Austin, Minnesota, appears to justify the reservation of a channel in the nonreserved band (Channels 221-300) for noncommercial educational use. The allotment and reservation of a commercial channel appears to be the only way Station KFSI-FM can provide interference-free noncommercial educational service to Rochester. Absent competing expressions of interest in the channel, we could modify Station KFSI-FM's construction permit to specify Channel *225A.

6. Alternatively, in response to Lellman's proposal, Channel 225A can be allotted to Rochester as that community's fifth local FM service in compliance with the Commission's spacing requirements provided there is a site restriction 4.1 kilometers (2.6 miles) west of the community.[4] The site restriction will prevent a short spacing to Station WIZM-FM, Channel 227C, LaCrosse, Wisconsin, and to the allotment of Channel 225A at Elk Mound, Wisconsin. We note that there is a construction permit on file for the channel at Elk Mound at a site that is fully spaced to Channel 225A at Rochester (BPH-880225MQ).

7. In response to the petition filed by Mad Hatter, our engineering analysis has determined that Channel 279C3 can be substituted for Channel 276A at Clear Lake, Iowa, in compliance with the Commission's spacing requirements at Mad Hatter's specified site, provided Channel 225A is substituted for Channel 279A at Osage, Iowa.[5] This substitution would provide Clear Lake with a wide area FM service. Channel 279A at Osage is presently licensed to Station KCZY. Mad Hatter has proposed the substitution of Channel 225A for 279A at Osage at Station KCZY's licensed site.[6] We shall propose to modify the license of Station KLKK(FM), Channel 276A, to specify operation on Channel 279C3 in accordance with Section 1.420(g) of the Commission's Rules, and the modification of the license of Station KCZY to specify Channel 225A in lieu of Channel 279A. We will issue a *Show Cause*

Order to the licensee of Station KCZY why its license should not be modified to specify Channel 225A in lieu of Channel 279A.

8. We believe that the public interest would be served by seeking comment on these proposals for the reasons stated above. Accordingly, we propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
Community	Present	Proposed
OPTION I		
Rochester, Minnesota	243C2, 248C, 269C2, 295C	*225A, 243C2, 248A, 269C2, 295C
OPTION II		
Rochester, Minnesota	243C2, 248C, 269C2, 295C	225A, 243C2, 248A, 269C2, 295C
OPTION III		
Clear Lake, Iowa	276A	279C3
Osage, Iowa	279A	225A

9. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Mega Media, Ltd., the licensee of Station KCZY, Osage, Iowa, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 225A in lieu of Channel 279A.

10. Pursuant to Section 1.87 of the Commission's Rules, Mega Media, Ltd., may, not later than **June 10, 1991,** file a written statement showing with particularity why its license should not be modified as proposed in the Order to Show Cause. The Commission may call on Mega Media, Ltd., to furnish additional information. If Mega Media, Ltd., raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, Mega Media, Ltd., will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

11. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Order* to the following:

Mega Media, Ltd.
Radio Station KCZY(FM)
207 North Main Street
Charles City, Iowa 50616

12. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

13. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert S. Stone
McCampbell & Young
800 South Gay Street
Knoxville, Tennessee 37929
(Counsel for Faith Sound, Inc.)

Jay Lellman
P.O. Box 1307
Eau Claire, Wisconsin 54702

John S. Neely
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel for Mad Hatter Broadcasting, Inc.)

14. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

15. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Faith Sound states that Midwest fully supports the proposed substitution at Rochester and notes that Midwest assisted in the preparation of its proposal.

[2] In MM Docket 89-25, Station KCZY, Osage, Iowa, was ordered to move from Channel 224A to 279A, effective April 2, 1990. *See* 4 FCC Rcd 909 (1990).

[3] The coordinates for noncommercial Channel *225A at Rochester are 44-01-30 and 92-31-30.

[4] The coordinates for Channel 225A at Rochester are 44-01-02 and 92-30-50.

[5] The coordinates for Channel 279C3 at Clear Lake are 42-59-54 and 93-17-44.

[6] The coordinates for Channel 225A at Osage are 43-19-20 and 92-51-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-83

In re Applications of

PORT ST. LUCIE BROADCASTING LIMITED PARTNERSHIP (hereafter "PSL Limited")	File No. BPH-891016MK
ST. LUCIE RADIO CORPORATION (hereafter "SLRC")	File No. BPH-891017MC
PORT ST. LUCIE COMMUNICATIONS, INC. (hereafter "PSLC")	File No. BPH-891018MC
RICHARD M. CARRUS (hereafter "Carrus")	File No. BPH-891018MD
CITYRON CORP. (hereafter "Cityron")	File No. BPH-891018ME
PORT ST. LUCIE BROADCASTING CORPORATION (hereafter "PSLB")	File No. BPH-891018MF
BLUE RAINBOW BROADCAST SYSTEM, INC. (hereafter "Blue Rainbow")	File No. BPH-891018MG
ST. LUCIE PROGRESSIVE MEDIA, INC. (hereafter "SLPM")	File No. BPH-891018MH
HORTON BROADCASTING COMPANY, INC. (hereafter "Horton")	File No. BPH-891018MI
PREMIER NETWORK BROADCAST LIMITED PARTNERSHIP (hereafter "Premier")	File No. BPH-891018MM
EVETT COMMUNICATIONS, INC. (hereafter "Evett")	File No. BPH-891018MN
SUE K. SCHMIDT (hereafter "Schmidt")	File No. BPH-891018MO
Frank J. Banks d/b/a BANKS INVESTMENT COMPANY (hereafter "Banks")	File No. BPH-891018MQ
DEAN COMMUNICATIONS, INC. (hereafter "Dean")	File No. BPH-891018MR
SURFSIDE BROADCASTING, A GENERAL PARTNERSHIP (hereafter "Surfside")	File No. BPH-891018MS
DOUGLAS JOHNSON (hereafter "Johnson")	File No. BPH-891018MT
ST. LUCIE BROADCASTING, INC. (hereafter "SLBI")	File No. BPH-891018MU
SALSA RADIO LIMITED (hereafter "Salsa")	File No. BPH-891018MV

For Construction Permit
for a New FM Station on
Channel 267A (101.3 MHz)
in Port St. Lucie, Florida

HEARING DESIGNATION ORDER

Adopted: March 26, 1991; Released: April 17, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. *PSL Limited.* As of February 9, 1990, the close of the amendment of right period in this proceeding, PSL Limited was a limited partnership comprised of one general partner (Olivia B. Dunnigan) and two limited partners (Richard H. Adams, Jr. and John J. Rutledge II). In *Marlin Broadcasting of Central Florida, Inc.*, 4 FCC Rcd 7945 (1989), the Review Board at Footnote 18 stated that it could not grant the application of Highland Communications, Ltd. ("Highland") without first remanding the proceeding on an issue to explore the roles of its "limited" partners Adams and Rutledge in *Rockledge Radio, Ltd.*, 4 FCC Rcd 3465 (ALJ 1989). In *Rockledge* the

Presiding Judge found that an applicant, created by Highland's principals, Adams and Rutledge, was a sham, as it recruited a purported "general" partner to front for its "limited" partners. In that proceeding, it appears that Adams and Rutledge played a prominent role in attempting to perpetrate the alleged sham. As a result, the Review Board refused to approve a settlement in which Adams, *inter alia*, would be a principal of the successor licensee. *See Rockledge Radio, Ltd.*, 4 FCC Rcd 5092 (Rev. Bd. 1989). Subsequently, in *Silver Springs Communications*, 5 FCC Rcd 469 (1990), the Presiding Judge made similar findings.[2] Specifically, the Judge stated that the involvment of Richard Adams in sham applications is nothing new and reached the same conclusion that the Review Board reached in *Marlin, supra*. Basically, after consideration of Adams' and the other limited partners' involvement in the Highland application, the Judge concluded that the past involvement and participation of the limited parters augurs that the general partner "will continue to rely upon, and defer to, the 'limited' partners."

3. On January 15, 1991, PSL Limited filed an amendment pursuant to 47 C.F.R. § 1.65 reporting, *inter alia*, that the limited partnership interest held by Richard Adams has been transferred to Gary Magee. The amendment will be accepted for § 1.65 purposes only. However, because the organizational structure of PSL Limited in the instant proceding, as of the close of the amendment of right period, was virtually identical to that of Highland in the *Rockledge* proceeding and to that of Silver Springs Radio Communications, Ltd. in the *Silver Springs* proceeding, and because Adams' role in the Rockledge sham was not entirely clear from *Rockledge*, the following issues will be specified against PSL Limited: whether PSL Limited's organizational structure was a sham, whether PSL Limited made a material misrepresentation in certifying to the Commission that "no limited partner will be involved in any material respect in the management or operation of the proposed station," and whether PSL Limited therefore possesses the basic qualifications to be a licensee of the facilities sought herein.

4. *Premier.* Premier's application, as originally filed, contained a certification that it had sufficient net liquid assets on hand, or that sufficient funds were available from committed sources, to construct and operate the requested facilities for three months without revenue. However, on September 7, 1990 Premier amended its application to report that its primary source of funds, the National Bank of Washington (NBW), had formally announced that it was going out of business because its parent company, Washington Bancorp, had declared bankruptcy. [NBW was subsequently taken over by the FDIC until August 13, 1990 when the FDIC announced that certain assets had been sold to the Riggs National Corporation.] Premier states that because NBW no longer exists, it has become necessary for the applicant to secure a different source of funding for its proposed FM facility. Premier goes on to state that it is currently taking such measures and will notify the Commission once a new source of funding has been secured. To date, Premier has not amended its application to report a new source of funding. Accordingly, an appropriate issue will be specified below.

5. On October 22, 1990, SLRC filed a petition to dismiss Premier's application. SLRC argues that Premier is now financially unqualified because it has lost its source of financing and has not timely amended its application to report a new source of funding. Therefore, SLRC believes Premier's application is defective and should be dismissed. In light of the action taken in the previous paragraph of this Order, SLRC's petition will be granted to the extent indicated herein and denied in all other respects. *See Northhampton Media Associates*, 4 FCC Rcd 5517 (1989).

6. *PSL Limited, Cityron and SLBI.* Section III, Item 3 (Financial Qualifications) of FCC Form 301 requires the applicant to identify each source of funds, including the name, address, and telephone number of the source and a contact person if the source is an entity. PSL Limited, Cityron and SLBI each list a bank or banks as the primary source of funds. However, these applicants did not provide the name of a contact person for their respective banks. Accordingly, they will be required to provide to the presiding Administrative Law Judge within 30 days of the release of this Order an amendment which corrects this omission.

7. *PSL Limited and Premier.* The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301, and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although PSL Limited and Premier have filed such statements, they are deficient. PSL Limited has failed to identify specific sources of recruitment specializing in women candidates. Premier has failed to identify the specific school(s) in its proposed training program for minorities and women interested in entering the broadcast field. Accordingly, PSL Limited and Premier will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order or an appropriate issue will be specified by the Judge.

8. *SLRC, Cityron, SLPM, SLBI and Salsa.* Section II, Item 1 of FCC Form 301 (June 1989) requires that an applicant specify its residence (number, street, city, state) as well as the home address of each of its principals. SLRC, Cityron, SLPM, SLBI and Salsa have not completed Item 1 correctly. SLRC did not give the address of and the principals of the corporation. Cityron, SLPM and SLBI did not list the applicant. Salsa did not give the address of the applicant. Accordingly, these applicants must each submit an amendment which gives all the information required by Section II, Item I to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. *PSLB.* Section II, Page 3, Item 8, (Legal Qualifications) asks the applicant if any of the parties to the applicant or non-party equity owners in the applicant are related to each other. PSLB responded, "No." However, Section II, Page 2 (Organizational Table) of PSLB's application lists Patricia Ann Grozo as president and director of the applicant, John Angelo Grozo as a director of the applicant, and indicates that both parties reside at the same address. The application does not give the relationship of these two parties to each other. Accordingly, PSLB will be required to submit to the presiding Administrative Law Judge within 30 days of the release of this Order an amendment clarifying the relationship of Patricia Ann Grozo and John Angelo Grozo.

10. *Surfside.* Surfside's 3.16 mV/m contour covers approximately 64.7% of the proposed community of license. Surfside has requested a waiver of § 73.315(a). In support

of its waiver request Surfside states that "due to limited land available, applicant is unable to secure any other sites except for the proposed co-location on an existing tower... Further, those portions of Port St. Lucie which are not within the theoretical city grade contour should receive adequate service because of the absence of any significant terrain features between the city and the proposed transmitter site." We have examined the waiver request and find that the reasons set forth by Surfside are not sufficient to justify its waiver request. Provision of at least 80% coverage of the community of license is possible, as evidenced by the proposals of the other 17 applicants in this proceeding. Accordingly, Surfside has not provided circumstances which warrant a waiver of § 73.315(a) and an appropriate issue will be specified.

11. *Blue Rainbow.* Section II, Page 2 (Organizational Table), Form 301 of Blue Rainbow's application lists three principals whose total ownership interest in the corporation equals 80%. Blue Rainbow has not accounted for the remaining 20% interest in the company. Accordingly, Blue Rainbow will be required to file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order detailing the complete ownership structure of the corporation.

12. *PSLC and Carrus.* PSLC and Carrus propose to mount their antenna on existing tower structures. However, the tower data submitted by these applicants in Section V-B, Item 7, is inconsistent with that contained in the Commission's records. PSLC lists the overall height above ground level (AGL) as 137 meters and the overall height above mean sea level (AMSL) as 140 meters. Carrus lists an AGL value of 143 meters and an AMSL value of 146 meters. Commission record indicate heights of 143.0 meters AGL and 144.5 meters AMSL for the existing tower. Because PSLC and Carrus are clearly proposing to mount their antenna on an existing tower structures that are contained in the Commission's records, the discrepancies are neither a tenderability nor an acceptability defect and may be corrected by an amendment. Accordingly, PSLC and Carrus must either file an amendment with the presiding Administrative Law Judge within 30 days of the release of this Order correcting the heights listed in their applications, or submit documentation to establish that the heights specified are, in fact, correct and the Commission records are in error. In addition, because of the discrepancies in the heights, an FAA issue will be specified.

13. *PSL Limited and Premier.* Upon review of the contour maps submitted by PSL Limited and Premier, it is apparent that they were not aware of the recent expansion of the Port St. Lucie city limits and as a result utilized old city maps. Therefore, because the applicants have used outdated maps for the city limits of Port St. Lucie, it is difficult to evaluate the conflicting assertions made in their applications. More importantly, we cannot determine whether PSL Limited and Premier are in full compliance with the Commission's city coverage rule (47 C.F.R § 73.315(a)). While the Commission no longer requires a waiver request where an applicant proposes to include more than 80% of the community of license within the 3.16 mV/m contour, determinations of substantial compliance and accurate measurements cannot be made where applicants are basing their coverage predictions on outdated assessments of the city's boundaries. In order to properly evaluate the contentions of each applicant in this proceeding, the Commission must be assured that the applicants are all basing their proposals and computations on a set of city boundaries which have been fixed at some particular point in time. Accordingly, PSL Limited and Premier will be required to provide to the presiding Administrative Law Judge within thirty days of the release of this Order a contour map that includes the recent expansion of the Port St. Lucie city boundaries in order to show that they are in compliance with § 73.315(a).

14. *Carrus and Cityron.* The engineering data submitted by Carrus and Cityron does not clearly demonstrate that they provide a 3.16 mV/M signal to the entire proposed city of license, as required by Section 73.315(a) of the Commission's Rules. The FM Branch does not require waiver of this requirement unless the proposed 3.16 mV/M coverage falls below 80% of the area of the principal community. See *John R. Hughes,* 50 Fed. Reg. 5679 (February 11, 1985). See also *Southwest Communications, Inc.*, released July 16, 1986 (Letter from the Chief, FM Branch, reference 8920-HVT). Engineering studies reveal that Carrus' and Cityron's 3.16 mV/m contour are in substantial compliance with this requirement. Accordingly, no waiver is required. Carrus' and Cityron's requests for waiver will be dismissed as moot.

15. On July 16, 1990, SLBI petitioned for leave to amend its application after the last day for filing amendments as of right. The subject amendment was accompanied by the good cause showing required by 47 C.F.R. § 73.3522(a)(2); consequently, the amendment is accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

16. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last day for filing minor amendments as of right. Under 47 C.F.R. § 1.65 the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	DATES(S) FILED
PSL Limited	January 15, 1991
SLRC	September 17, 1990
Premier	September 7, 1990
Evett	February 13, 1990
Surfside	November 30, 1990
Johnson	March 4, 1991
Salsa	June 18, 1990

17. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by PSL Limited would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

18. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity,

together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

19. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

20. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether, as of February 9, 1990, PSL Limited's organizational structure was a sham.

2. To determine, from the evidence adduced pursuant to Issue 1, above, whether PSL Limited made a material misrepresentation in certifying to the Commission that "no limited partner will be involved in any material respect in the managment or operation of the proposed station."

3. To determine, from the evidence adduced pursuant to Issues 1 and 2, above, whether PSL Limited possesses the basic qualifications to be licensee of the facilities sought herein.

4. To determine with respect to Premier, whether the applicant is financially qualified.

5. To determine whether Surfside's proposal would provide coverage of the city sought to be served, as required by § 73.315(a) and, if not, whether circumstances exist which warrant waiver of that Section.

6. To determine whether there is a reasonable possibility that the tower heights and locations proposed by PSL Limited, PSLC and Carrus would constitute a hazard to air navigation.

7. To determine which of the proposals would, on a comparative basis, best serve the public interest.

8. To determine, in light of the evidence adduced pursuant to the specified issues, which of the appications should be granted, if any.

21. IT IS FURTHER ORDERED, That the petition to dismiss filed on October 22, 1990 by SLRC against Premier's application IS GRANTED to the extent indicated herein and IS DENIED in all other respects.

22. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PSL Limited, Cityron and SLBI shall provide to the presiding Administrative Law Judge the information requested in paragraph 6 hereinabove.

23. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PSL Limited and Premier shall submit Section VI information in accordance with the requirements of § 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

24. IT IS FURTHER ORDERED, That SLRC, Cityron, SLPM, SLBI and Salsa shall each submit an amendment which contains the information required by Section II, Item I of FCC Form 301, to the Presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, PSLB shall provide to the presiding Administrative Law Judge the information required in paragraph 9 hereinabove.

26. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Blue Rainbow shall submit to the presiding Administrative Law Judge a corrective amendment in accordance with paragraph 11 hereinabove.

27. IT IS FURTHER ORDERED, That PSLC and Carrus shall submit an amendment in accordance with paragraph 12 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That PSL Limited and Premier shall submit an amendment in accordance with paragraph 13 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

29. IT IS FURTHER ORDERED, That the requests for waiver of 47 C.F.R. § 73.315(a) filed by Carrus and Cityron ARE DISMISSED AS MOOT.

30. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by PSL Limited, SLRC, Premier, Evett, Surfside, SLBI, Johnson and Salsa ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

31. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

32. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

33. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

34. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in

such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] Gantt Communications, Inc. (BPH-891018MP) requested dismissal of its application. The request was voluntary and in accordance with our requirements governing such matters. Accordingly, the application was dismissed by Commission letter dated January 17, 1991.

[2] In the *Silver Springs* proceding, Silver Springs Radio Communications, Ltd. filed an application for a new FM at Silver Springs, Florida. The application was a limited partnership comprised of one general partner (Patricia Gaskings) and two limited partners (Richard Adams and John Adams).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-104

In the Matter of

Amendment of Section 73.202(b), RM-7668
Table of Allotments,
FM Broadcast Stations.
(Sun Prairie and Mauston,
Wisconsin and Freeport,
Illinois)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: March 28, 1991; Released: April 17, 1991

By the Chief, Allocations Branch:

1. The Commission considers herein a petition for rule making filed on behalf of First Choice Communications, Inc. ("petitioner"), licensee of FM Station WMAD-FM, Channel 221A, Sun Prairie, Wisconsin, seeking the substitution of Channel 221B1 for Channel 221A and modification of its license to specify operation on the higher class channel.

2. A staff engineering analysis of the proposal reveals that Channel 221B1 can be allotted to Sun Prairie at petitioner's specified site 18.8 kilometers (11.7 miles) west of the community in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules provided substitutions are made at Mauston, Wisconsin, and Freeport, Illinois.[1] Petitioner has proposed the substitution of Channel 275A for Channel 221A, Station WRJC-FM, Mauston, Wisconsin, and the substitution of Channel 295A for Channel 221A, Station WFPS, Freeport, Illinois. The substitutions can be made at the licensed sites of Station WRJC-FM and WFPS.[2] Petitioner has indicated a willingness to reimburse the licensees of Station WRJC-FM and WFPS for the cost of changing their facilities to the requested channels. [3]

3. Our engineering analysis also reveals that the 1mV/m contour of requested Channel 221B1 at Sun Prairie would lie within the Grade B (47 dBu) contour of Station WITI(TV), Channel 6, Milwaukee, Wisconsin. In such instances, the Commission has expressed its concern regarding the effect potential upgrades on Channel 221 may have on the availability of noncommercial educational channels operating on Channels 218, 219 and 220 in markets where there exists a TV Channel 6 operation. In such markets, the existence of a TV Channel 6 station effectively restricts the use of the lower portion of the noncommercial educational band, while upgrades on Channel 221 could restrict the use of the higher portion of the spectrum. In accordance with the *First Report and Order* in MM Docket No. 86-144, 52 FR 8259, March 17, 1989, petitioner should provide a preclusion study demonstrating the impact of allotting Channel 221B1 to Sun Prairie on the availability of Class A, C3, C2, C1 and C noncommercial educational allotments on Channels 218, 219 and 220. Guidelines for the preclusion study are as follows:

(1) Preclusion study should be done on each affected channel for each possible class of noncommercial FM station (that is A, B1 and B in zone 1 and 1A or A, C2, C1 and C in zone 2).

(2) For each class of noncommercial educational FM station, maximum power and antenna height and omnidirectional operation should be assumed.

(3) Preclusion should be considered to occur only if the noncommercial educational FM station would be prevented by the upgrade, and is not already precluded either by the existing channel 221A station that is the subject of the proposal or by other commercial or noncommercial educational FM stations.

(4) Preclusion should be determined both inside of and outside of the channel 6 Grade B contour. While the existence of the channel 6 station imposes a burden on noncommercial educational FM applicants, determination of the preclusive effect of the channel 6 can be complicated and may be dependent on the particular transmitter site selected. Therefore, the initial preclusion area determination should be done without considering the channel 6 station's impact. The channel 6 impact can be included at a later stage of the study, if necessary.

(5) Within any identified preclusion area, significant communities, normally those with a population in excess of 1000, should be identified. Existing local noncommercial educational FM stations in the precluded communities should be listed.

(6) Optionally, if precluded communities without local noncommercial educational FM service are found, additional information can be provided, including:

(a) availability of noncommercial educational FM service from stations licensed to nearby communities;

(b) availability of other channels for a noncommercial educational FM station in the precluded community (include consideration of channel 6 station impact); and

(c) impact of channel 6 on noncommercial educational FM channel availability in the community. If a precluded community is a reasonable distance beyond the Grade B contour of the channel 6 station, then it is possible that the channel 6 station has no effect on the availability of a particular class of noncommercial educational FM station in that community. The noncommercial educational FM channel that is closest to channel 6 in frequency, and therefore most likely to be affected is channel 201. Preclusion in a community that is beyond the channel 6 impact distance is not significant. The appropriate distance for class C stations is found in Table A

of Section 73.525(a)(1) of the Commission's Rules. Lesser distances are appropriate for other classes of noncommercial educational FM stations. For convenience, the distances have been calculated and are as follows:

Class	Distance from Channel 6 station
A	165 kilometers
B1	189 kilometers
B	207 kilometers
C2	207 kilometers
C1	234 kilometers
C	265 kilometers

Precluded communities within these distances from the channel 6 station generally constitute a negative factor to be weighed against the public interest gains sought through the upgrade.

4. We believe the proposal warrants consideration since it could provide Sun Prairie, Wisconsin, with an expanded coverage area FM service. Therefore, we shall propose to substitute Channel 221B1 for Channel 221A at Sun Prairie, Wisconsin. As requested, we also propose to modify the Class A license of Station WMAD-FM to specify operation on Channel 221B1. Pursuant to the provisions of Section 1.420(g) of the Commission's Rules, we will not accept other expressions of interest in the use of Channel 221B1 at Sun Prairie. To accommodate the upgrade at Sun Prairie, we shall propose the substitution of Channel 275A for Channel 221A at Mauston, Wisconsin, and modification of the license for Station WRJC-FM, and substitution of Channel 295A for Channel 221A at Freeport, Illinois, and modification of the license for Station WFPS, in accordance with the Commission's Rules.

5. Accordingly, for the reasons stated above, we believe it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Freeport, Illinois	221A, 253B	253B, 295A
Mauston, Wisconsin	221A	275A
Sun Prairie, Wisconsin	221A	221B1

6. IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, WRJC Incorporated, the licensee of Station WRJC-FM, Mauston, Wisconsin, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 275A in lieu of Channel 221A, and Friends Communication, Inc., the licensee of Station WFPS, Freeport, Illinois, SHALL SHOW CAUSE why its license should not be modified to specify operation on Channel 295A in lieu of Channel 221A.

7. Pursuant to Section 1.87 of the Commission's Rules, WRJC, Incorporated and/or Friends Communications, Inc. may, not later than **June 10, 1991,** file written statements showing with particularity why their respective licenses should not be modified as proposed in the Order to Show Cause. The Commission may call on WRJC, Incorporated and/or Friends Communications, Inc. to furnish additional information. If WRJC Incorporated and/or Friends Communications, Inc. raises substantial and material questions of fact, a hearing may be required to resolve such questions pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, WRJC, Incorporated and/or Friends Communications, Inc. will be deemed to have consented to the modification as proposed in the Order to Show Cause and a final Order will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

8. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this Notice of Proposed Rule Making and Order to Show Cause to the licensees of Station WRJC-FM, Mauston, Wisconsin, and Station WFPS, Freeport, Illinois, as follows:

WRJC, Incorporated	Friends Communications, Inc.
Station WRJC-FM	Station WFPS-FM
Fairway Lane, Box 100	Box 701
Mauston, Wisconsin 53948	Freeport, Illinois 61032

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for proper procedures. Additionally a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Lawrence Bernstein
Bring & Bernstein
1818 N Street, N.W., Suite 200
Washington, D. C. 20036
(Counsel for the petitioner)

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by

the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 221B1 at Sun Prairie are 43-12-30 and 89-26-30.

[2] The coordinates for Channel 275A at Mauston are 43-47-16 and 90-11-52. The coordinates for Channel 295A at Freeport are 42-19-41 and 89-43-32.

[3] Although petitioner has stated a willingness to reimburse the Mauston and Freeport licensees, it has also indicated that should those licensees decide to upgrade their stations to six kilowatts, those additional expenses should be the responsibility of the respective licensees.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-105

In the Matter of

Amendment of Section 73.202(b), RM-7677
Table of Allotments,
FM Broadcast Stations.
(Socastee, South Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1991; Released: April 17, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Puritan Radiocasting Company ("petitioner"), requesting the substitution of Channel 258C3 for Channel 258A at Socastee, South Carolina, and the modification of its construction permit for a new station on the Class A channel to specify operation on the higher powered channel.[1]

2. We believe the public interest would be served by proposing the substitution of Channel 258C3 for Channel 258A at Socastee since it could provide the community with a wide area coverage FM service. Channel 258C3 can be allotted to Socastee in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.4 kilometers (6.5 miles) east to avoid a short-spacing to the proposed allotment of Channel 257C3 at Kingstree, South Carolina (RM-6826) and to accommodate petitioner's desired transmitter site.[2] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 258C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 258C3 at Socastee or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Socastee, South Carolina	258A	258C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ronald D. Rackley
Partner
Puritan Radiocasting Company
6211 Hillview Avenue
Alexandria, Virginia 22310
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner failed to state its intention to apply for Channel 258C3, if allotted. Therefore, it is requested to do so in comments.

[2] The coordinates for Channel 258C3 at Socastee are North Latitude 33-42-20 and West Longitude 78-53-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.606(b),
Table of Allotments,
Television Broadcast Stations.
(Various Locations)

ERRATUM

Released: April 17, 1991

By the Chief, Policy and Rules Division:

1. On January 4, 1991, the Commission released an *Order*, DA 90-1871, in the above captioned proceeding, 6 FCC Rcd 30 (1991). The *Order* incorrectly states that Television Channel 21-, Birmingham, Alabama, is authorized to operate at Homewood, Alabama. Channel 21- is authorized at Birmingham. The *Order* is hereby corrected to remove Channel 21-, Birmingham, from the list of communities and channels affected by that action.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-106

In the Matter of

Amendment of Section 73.202(b), RM-7671
Table of Allotments,
FM Broadcast Stations.
(Ocracoke, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1991; Released: April 17, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hurricane Communications, Inc. ("petitioner"), requesting the allotment of Channel 225A to Ocracoke, North Carolina, as its first local FM service. Petitioner states that it will apply for the channel, if allotted.

2. Section 307(b) of the Communications Act of 1934, as amended, mandates that the Commission fairly, equitably, and efficiently distribute frequencies " . . . among the several States and communities." The Commission has defined "communities" as geographically identifiable population groupings. Generally, if a community is incorporated or is listed in the U.S. Census, that is sufficient to demonstrate its status. According to petitioner, Ocracoke, located on the North Carolina Outer Banks, has a 1990 population of 650 persons. It describes Ocracoke as an isolated but well known year-round tourist spot and the primary community on Ocracoke Island. Petitioner makes the general statement that Ocracoke has all of the indicia of a community, including retail establishments, schools, a post office, and motels. Petitioner submits that Ocracoke is in need of a first local aural transmission service because of its relative isolation and vulnerability to frequent hurricanes which endanger the island. Ocracoke is not listed in the U.S. Census.[1] Therefore, the petitioner should present the Commission with more detailed information to demonstrate that Ocracoke is incorporated, or that it has social, economic, cultural, or governmental indicia to qualify it as a "community" for allotment purposes. *See, e.g., Beaver Springs, Pennsylvania*, 4 FCC Rcd 5373 (1989), *Sargent, Nebraska*, 4 FCC Rcd 3933 (1989), *Bartow, Georgia, et al.*, 4 FCC Rcd 6876 (1989), *East Hemet, California, et al.*, 4 FCC Rcd 7895 (1989), and *Ellwood, California*, 50 Fed. Reg. 13031, published April 2, 1985.

3. We believe the public interest would be served by proposing the allotment of Channel 225A to Ocracoke, North Carolina, since it could provide the community with a first local FM service if it is determined that Ocracoke is a community for allotment purposes. Channel 225A can be allotted to Ocracoke in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2]

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ocracoke, North Carolina	--	225A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Toni T. Rinehart
2557-E Mountain Lodge Circle
Birmingham, Alabama 35216
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] We note that Ocracoke is listed in the 1988 Rand McNally Commercial Atlas and attributed with a population of 600. However, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi,* 48 FR 5974 (1983).

[2] The coordinates for Channel 225A at Ocracoke are North Latitude 35-06-52 and West Longitude 75-58-53.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-107

In the Matter of

Amendment of Section 73.202(b), RM-7640
Table of Allotments,
FM Broadcast Stations.
(Huntingdon and Atwood, TN)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 28, 1991; Released: April 17, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by WJPJ, Inc. ("petitioner"), permittee of Station WBVD(FM), Channel 229A, Huntingdon, Tennessee, requesting the reallotment of Channel 229A from Huntingdon to Atwood, Tennessee. In addition, petitioner requests the modification of its construction permit for Channel 229A at Huntingdon (BMPH-900614ID) to specify Atwood as the community of license. Petitioner states that it will apply for Channel 229A, if allotted to Atwood.

2. Petitioner states that the reallotment of Channel 229A to Atwood will provide the community with its first local FM service but will not deprive Huntingdon of its only local aural transmission service. According to the 1980 U.S. Census, Atwood has a population of 1,143 persons. Atwood currently has no local aural transmission service, whereas AM Station WJPJ and WHZZ(FM) are licensed to Huntingdon, and petitioner is the permittee of what will be the second FM station, and third aural transmission service, in the community. Petitioner believes the addition of this third station to Huntington would be detrimental to the two existing stations which, it states, are having financial difficulties. Therefore, petitioner contends that the allotment of Channel 229A to Atwood would be the most efficient use of the available spectrum.

3. We believe the proposal warrants further consideration since it could provide Atwood with its first local aural transmission service. The proposal would not deprive Huntingdon of its only aural transmission service. Channel 229A can be allotted to Atwood in compliance with the Commission's minimum distance separation requirements with a site restriction of 4.8 kilometers (3.0 miles) south of the community to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's authorization for the new station at Huntingdon to specify Atwood as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 229A at Atwood or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Huntingdon, Tennessee	229A, 265A	265A
Atwood, Tennessee	- - -	229A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **June 10, 1991** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
Suite 400
1225 Connecticut Avenue, NW
Washington, D.C. 20036-2679
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202) 632-6302. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 229A at Atwood are North Latitude 35-56-00 and West Longitude 88-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

CARMELITA GOSSARD File No. 63500-88-12-RPS
d/b/a AA BEEP

Notice of Apparent Liability for
Forfeiture Penalty for Station KNDK662
in the Public Land Mobile Service at
Cudjoe Key, Florida

MEMORANDUM OPINION AND ORDER

Adopted: April 11, 1991; Released: April 17, 1991

By the Chief, Common Carrier Bureau:

1. Carmelita Gossard d/b/a AA Beep (Gossard) has filed a letter requesting reconsideration and remission of a $1,890.00 forfeiture. *See Carmelita Gossard d/b/a AA Beep*, 5 FCC Rcd 6695 (Mob. Serv. Div. 1990) (*Gossard Order*).

I. BACKGROUND

2. On September 24, 1987, the Commission granted Gossard Special Temporary Authority (STA) to operate frequency 158.10 MHz facilities for station KNKK662 at Cudjoe Key, Florida, from September 28, 1987, to December 28, 1987. On October 29, 1987, Gossard requested permission to move a frequency 152.75 MHz facility to Sugarloaf Key, Perkey, Florida (Perkey). On April 4, 1988, the STA was granted to permit operation on frequency 152.75 MHz at Perkey.

3. On November 24, 1987, the Commission received information indicating that Gossard was providing service on frequency 158.10 MHz from a location other than that specified in the STA. As a result, the MSD issued a Notice of Apparent Liability for Forfeiture (*NALF*) to Gossard, finding that an apparent violation of Section 22.3 of the Commission's rules had occurred for operating Station KNKK662 in an unauthorized manner, *i.e.*, operating frequency 158.10 MHz at Perkey without having been authorized to do so. Because Gossard took no action in response to the *NALF*, the MSD issued the *Gossard Order*, which ordered Gossard to pay the forfeiture. Gossard filed a December 18, 1990 letter requesting remission of the forfeiture.

II. GOSSARD'S CONTENTIONS

4. Gossard argues that she could not erect a radio tower at the authorized site because it was contested by various federal and state departments and agencies. Because this problem was not resolved, Gossard says she filed a second STA request to operate from Perkey on frequency 152.75 MHz, near the original site. Gossard says she felt she met her obligation and could commence operating at the Perkey site on frequency 158.10 MHz because: (1) she properly notified the Commission of the move, (2) she considered this relocation as only a temporary move pending availability of the original site, and (3) the distance was increased by only one mile. Gossard admits that she never received a Commission response to her request for STA to move to the Perkey location. Gossard also claims that in a Fall 1987 meeting with both MSD staff and counsel for American Paging, Inc. (which had filed a petition against Gossard), she was given verbal authority to operate on frequency 158.10 MHz at Perkey.

5. Gossard further argues that payment of the $1,890.00 forfeiture would impose a significant economic burden on her operation. She asserts that her business is a small disadvantaged one, is largely supported by the compensation her husband received for a 100-percent service-connected disability and that agency proceedings have required business expenses of $40,000.00 or more.

III. DISCUSSION

6. After carefully reviewing the facts and Gossard's assertions, we decline to grant her request for remission of the forfeiture. A licensee is responsible for complying with Commission rules and is responsible for its own acts and omissions. *See, e.g., Lorain Community Broadcasting Co.*, 18 FCC 2d 686 (1969). If Gossard had operated in accordance with the granted STAs, there would have been no violation. She operated in a manner not comporting with her STA grants and, therefore, the violation occurred. By Gossard's own admission, she moved to a new site to operate the frequency 158.10 MHz facility at Perkey without receiving Commission authority.[1] We have previously noted that

> [t]he fact that the applicant's violation occurred through inadvertence does not prevent it from being willful. It is not necessary that the violation be intentional. All that is necessary is that the licensee knew he was doing the act in question . . . .

Mobile Radio Telephone & Paging Service, Inc., Mimeo No. 2397 (Com. Car. Bur., released Feb. 16, 1983). *See also* Section 312(f) of the Communications Act of 1934, as amended (the Act) which defines "willful." Gossard's knowing operation of frequency 158.10 MHz facilities without authorization is sufficient under the law to constitute willful violation. As a licensee, Gossard was required to operate in accordance with Commission rules and the terms of her authorization and, thus, can not absolve herself of her duty to do so because she thought her STA would be forthcoming when the Commission "caught up" on its work. Simply put, the Commission was not remiss in any way because the MSD acted on, and granted Gossard's STA requests, *i.e.*, the request to operate frequency 158.10 MHz facilities at Cudjoe Key and the request to operate on frequency 152.75 MHz at Perkey.

7. We also find that her statements, in the absence of any supporting evidence, are insufficient to support a claim of economic hardship. Gossard did not submit any financial data to support her assertion that the assessed amount would place a strain on her operations. *See, e.g., Telepage Communications, Inc.*, 5 FCC Rcd 4799 (Mob. Serv. Div. 1990).

8. The nature, circumstances, extent, and gravity of the prohibited violation were taken into account in setting the proposed forfeitures. *See* Section 503(b)(2)(B) of the Act. As a result, we conclude that Gossard's asserted mitigating factors are insufficient to justify remission of the imposed forfeiture. Therefore, we affirm the *Gossard Order* and uphold the $1,890.00 forfeiture.

IV. ORDERING PARAGRAPHS

9. Accordingly, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Carmelita Gossard d/b/a AA Beep FORFEIT to the United States the sum of One Thousand Eight Hundred Ninety Dollars ($1,890.00), for violation of Section 22.3 of the Commission's rules. Payment of the forfeitures may be made by mailing a check or similar instrument to the Commission payable to the order of the Federal Communications Commission within thirty (30) days from the date of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 10209, Washington, DC 20036.

10. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act, 47 U.S.C. § 504(a).

11. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Carmelita Gossard d/b/a AA Beep by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Richard C. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] Contrary to Gossard's assertion, the Fall 1987 meeting led to Gossard's being given authority to operate on frequency 152.75 MHz at Perkey, and Commission files do not indicate that she was ever given verbal authority in that meeting or at any other time to operate on frequency 158.10 MHz at Perkey. Furthermore, a review of Commission files indicates that we have no record of ever receiving a STA request from Gossard to operate frequency 158.10 MHz at Perkey.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

Contel Cellular, Inc. File No. MSD-91-9

For a Tax Certificate in the
Domestic Public Cellular
Telecommunications Radio Service for
Divestiture of its Minority Interest
in Frequency Block B, in Market No. 88,
Chattanooga, Tennessee

MEMORANDUM OPINION AND ORDER

Adopted: April 12, 1991; Released: April 17, 1991

By the Chief, Mobile Services Division:

I. INTRODUCTION AND BACKGROUND

1. On February 7, 1991, Contel Cellular, Inc. filed the captioned request for a tax certificate. For the reasons stated below, we are denying Contel Cellular, Inc.'s (Contel) tax certificate request.

2. The Commission approved a transfer of thirteen cellular systems from McCaw Cellular Communications, Inc. to Contel, on the condition that Contel divest its existing minority interest (7.385%) in Chattanooga MSA Limited Partnership, (the wireline licensee in the Chattanooga, Tennessee MSA). Contel divested this interest for cash on January 30, 1990. Contel contends that pursuant to Section 1071(a) of the Internal Revenue Code, 26 U.S.C. §1071(a),[1] the Commission should grant it a tax certificate to allow it to defer rather than realize a taxable gain on the sale.

II. DISCUSSION

3. Contel does not meet the criteria of Section 1071. The sale of Contel's minority interest was not necessary to comply with a new or modified Commission policy. The original frequency allocation scheme established for the cellular service sought to ensure competition between the two cellular licensees in each cellular market. *See Cellular Systems*, 89 F.C.C. 2d 58, 69-77 (1982). Thus, ownership of cellular systems has been a primary concern in our oversight of transfers of control in order to follow the mandate of promoting competition, including the "antitrust component". *See e.g. James F. Rill, (Rill)*, 60 Rad. Rad. 2nd (P&F) 583, 596 (1986).[2] This concern has emphasized close scrutiny of an ownership interest coincident to a transfer of control regardless of whether that interest is a majority one. *See Rill, supra*, and cases cited *supra* note 2. We have required licensees to divest minority interests we found posed anti-competitive threats. *See GTE Corp. & Contel Corp. Merger*, FCC 91-49 (February 15, 1991). Recently the Commission proposed to codify these ownership restriction policies. *See Amendment of Part 22 (CC Docket 90-6), (NPRM-Unserved Areas)*, 5 FCC Rcd 1044 (1990). In so proposing, the Commission stated that inherent in the concept of the wireline set aside was the concept that the licensee in one frequency block in a market would not own an interest in the other frequency block in the same market. The basis for a proposed rule applicable to all cellular markets is the Commission's "longstanding and judicially validated policy favoring separate allocations for wireline and nonwireline mobile systems in order to foster the development of competing systems, techniques and equipment." *NPRM-Unserved Areas, supra, citing Cellular Systems, supra*, at 69-77. Our action requiring Contel to divest its minority interest in the wireline licensee was in furtherance of established Commission policies promoting competition between two frequency blocks per market and not the result of a new or changed policy.

4. In addition, a voluntary transaction does not qualify for a tax certificate if the prohibited interest is not in existence at the time the policy was changed. *See Tax Certificates*, 59 F.C.C.2d 91.92 (1976). In the instant transaction, Contel voluntarily acquired its interest in the Chattanooga nonwireline system knowing that it would be required to divest its cross interest in the competing system. Contel has not provided a sufficient public interest rationale for not following this general eligibility criterion in this case.

5. Contel contends that the Chattanooga divestiture was precisely the pro-competitive ownership change which Congress intended to foster in giving the Commission authority to grant tax certificates. *See Telocator Network of America (Nonwireline Cellular Transfers)*, 58 Rad. Reg. 2d (P&F) 1443, 1448 (1985). Contel asserts that the interest it divested was originally acquired as a result of a settlement process similar to that encouraged for the nonwirelines and therefore the same equitable treatment applied to the nonwirelines in granting them tax certificates[3] should also apply to the wirelines.

6. The Commission provided several reasons why it did not intend wirelines to be the recipients of tax certificates. *Nonwireline Cellular Transfers, supra*, involved nonwireline applicants attempting to comply with new policies encouraging the consolidation of partnership entities that arose upon the adoption of random selection procedures to select licensees. *See Cellular Lottery Rule Making*, 98 F.C.C. 2d 175, 196-197 and 213, n.13 (1984). The Commission in *Nonwireline Cellular Transfers* noted that due to the large number of nonwireline applicants as compared to wireline applicants, nonwireline entities had been unable to complete the exchanges and sales of their interests prior to the change in former Section 1031 of the tax code[4] as the wirelines had done. *Nonwireline Cellular Transfers*, at 1451, n.21. The Commission recognized that as a result, the large tax burdens the wirelines had been able to avoid would be incurred by the nonwirelines. *Id.* at 1450. Therefore, in granting Section 1071(a) treatment to nonwirelines, the Commission sought to bring the nonwirelines into competitive parity with the wirelines during the initial licensing stages for MSAs 31-90. Thus, this decision is not applicable to Contel.

7. Lastly, Contel contends that tax certificates should be available post-construction, although the Commission limited the availability of tax certificates to the period prior to the filing of the initial covering license. Contel

argues that the Commission also recognized that post-construction ownership changes might be necessary to effectuate more competitive enterprises. *Id.* at 1451. This argument is inapplicable to the instant case. The transaction in Chattanooga was not a result of a further consolidation within a frequency block during the initial phase of cellular licensing involving capital outlays for initial construction and operation. Rather, it involved Contel's own later business decision to acquire the licensee in another frequency block.

III. ORDERING CLAUSE

8. Accordingly, IT IS ORDERED That, the subject request of Contel Cellular, Inc. for a tax certificate for the sale of its minority interest in the wireline licensee in the Chattanooga, Tennessee MSA is denied.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Section 1071 provides the Commission authority to grant tax certificates, if the divestiture meets two criteria:

> (i) the sale or exchange is necessary or appropriate to effectuate a change in a policy of, or the adoption of a new policy by the Commission; and
>
> (ii) the relevant policy must relate to the ownership and control of "radio broadcasting stations."

[2] *See generally Naruc v. FCC*, 525 F. 2d 630, 636 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976). *See MMM Holdings*, 4 FCC Rcd 6838 (1989); *Communications Industries, Inc.*, Mimeo No. 0770, (Com. Car. Bur. 1985). *McCaw Communications of San Francisco, Inc.*, slip op. (Com. Car. Bur. March 7, 1985); *Advanced Mobile Service* (Los Angeles), 93 FCC 2d 639, 692 (1983).

[3] The Commission found that a pro-competitive rationale existed behind Congress' providing the Commission authority to grant tax certificates pursuant to Section 1071. *Non-wireline Cellular Transfers, supra*, at 1447-1449. The Commission specifically held that the language in Section 1071(a), "radio broadcasting station," would not preclude the grant of tax certificates to non-wireline carriers in cellular markets 31-90. *Id.* at 1450.

[4] Former Section 1031 of the tax code, 26 U.S.C. §1031, allowed the wirelines to claim non-recognition of gain from the sale or exchange of their partnership interests.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 2, 1991

COMMISSION REQUESTS COMMENT ON NECA'S PROPOSED ADDITIONAL REVISIONS TO THE AVERAGE SCHEDULES

On December 31, 1990, the National Exchange Carrier Association, Inc. (NECA) filed proposed revisions to the average schedules. On March 22, 1991, NECA filed additional revisions. First, NECA proposed revisions to comply with the five percent limitation on Other Billing and Collection Expenses that applies to cost companies. *See* National Exchange Carrier Association, Inc. Revisions of Tariff F.C.C. No. 5, Transmittal No. 425, Order, DA 91-116, 6 FCC Rcd 719 (released January 29, 1991). Second, NECA proposes to adjust the average schedules for the loss, to most co-operative telephone companies, of the federal income tax exemption that was provided by section 501(c)(12) of the Internal Revenue Code. *See* Internal Revenue Service, National Office Technical Advice Memorandum, Index Numbers 0501.12-02 and 0513.00-00 (March 15, 1991).

On March 27, 1991, NECA amended the revisions that it filed on March 22, 1991 to correct a typographical error and errors that resulted from an incorrect treatment of "patronage capital dividends." The amended revisions that NECA has proposed to its December 31, 1990 filing are contained in the Appendix to this Notice. NECA requests that these revisions become effective July 1, 1991.

Copies of NECA's March 22, 1991 filing, March 27, 1991 filing, and the record in this proceeding may be obtained from the Commission's public records duplication contractor, The Downtown Copy Center, Suite 140, 1114 21st Street, N.W., Washington, D.C. 20037. (202) 452-1422. The record in this proceeding is also available for public inspection and duplication at Room 544, 1919 M St., N.W., Washington, D.C. 20554. Commenting parties should file five (5) copies of their comments and reply comments at Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and two (2) copies with The Downtown Copy Center. For consideration in this proceeding, all comments and reply comments in this proceeding should be captioned "In the Matter of National Exchange Carrier Association March 22, 1991 and March 27, 1991 Proposed Revisions to the Average Schedule Formula."

Comments on NECA's March 22, 1991 proposed revisions to the average schedules, as amended by NECA's March 27, 1991 filing, should be filed on or before April 18, 1991. Reply comments should be filed on or before April 26, 1991.

For further information, contact Kent R. Nilsson, Room 544, 1919 M St., N.W., Washington, D.C. 20554. (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

APPENDIX

On March 22, 1991 and March 27, 1991, NECA modified the proposed revisions to the average schedules that it filed on December 31, 1990 for the following settlement functions.

Common Line

Where access lines per exchange are less than 385.554541, the settlement per access line would be: $11.275789 - (0.012825 x access lines per exchange). Where access lines per exchange are greater than or equal to 385.554541, the settlement per access line would be $6.331147.

Common Line Rate of Return Formula

The common line factor would be .569040 + 3.830757 x ROR.

Traffic Sensitive Central Office:

For less than 10,000 access lines, the settlement per minute would be [$.028676 + ($191.300826 / minutes per exchange)][1.32769-(.000032769)(access lines)]. For 10,000 or more access lines, the settlement per minute would be [$.028676 + ($191.300826 / minutes per exchange)].

Intertoll Switching:

The settlement per trunk would be $25.73.

Line Haul Distance Sensitive:

The settlement would be [($1.034214)(interstate circuit miles)] + [($.0011455)(traffic sensitive switched minutes)].

Line Haul Non Distance Sensitive:

The settlement per interstate circuit termination would be $38.95.

Traffic Sensitive Rate of Return:

The traffic sensitive factor would be equal to [0.542969 + (4.062501)(ROR)].

CABS and Access Administration:

The CABS and access administration settlement would be $648.86 + [($0.000451)(minutes)].

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Report No. DS-1068 **Released: April 1, 1991**

SATELLITE APPLICATIONS ACCEPTABLE FOR FILING; CUT-OFF ESTABLISHED FOR ADDITIONAL APPLICATIONS

The Commission has found, upon initial review, that the following applications filed by Motorola Satellite Communications, Inc. (Motorola) and Ellipsat Corporation (Ellipsat) for authority to construct low earth orbit satellite systems are acceptable for filing. The Commission reserves the right to return these applications, however, if, upon further review, it is determined that they are defective or not in conformance with the Commission's rules, regulations and policies.

MOTOROLA SATELLITE COMMUNICATIONS, INC. — File Nos. 9-DSS-P-91(87) CSS-91-010

Motorola has filed an application for authority to construct its IRIDIUM system. The IRIDIUM system proposes a constellation of 77 low earth orbit satellites circling the globe in seven polar orbits with eleven satellites in each orbit, approximately 413 nautical miles above the earth. In addition, Motorola requests authorization to construct 10 on-ground spares. The system proposes to use the L-band for subscriber links and will be interconnected by means of radio crosslinks in the Ka-band to form a network which provides continuous line-of-sight communications from and to any point on the earth's surface, as well as all points within an altitude of 100,000 feet above mean sea level. The IRIDIUM system is intended to provide domestic radio determination satellite service (RDSS), mobile satellite two-way digital voice and data communications between any two portable, mobile and transportable user units and interconnect any such subscriber unit to the public switched telephone network. Motorola requests a domestic license to provide service to the United States and its territories and possessions. Additionally, Motorola requests authority to provide transmission capacity between the United States and other nations for the provision of mobile services as foreign administrations authorize the use of the IRIDIUM system. To operate its system, Motorola proposes to use the following frequency bands:

Earth-to-space & Space-to-Earth:	1610-1626.5 MHz
Intersatellite crosslinks:	22.55-23.55 GHz
Satellite to fixed gateway/ control downlink:	18.8-20.2 GHz
Fixed gateway/control to satellite uplink:	27.5-30.0 GHz

Motorola requests a waiver of the U.S. Table of Frequency Allocations to allow non-conforming voice services to be provided in the 1.6 GHz band. Motorola proposes to sell its services on a non-common carrier basis in bulk to other carriers who, in turn, will offer their mobile radio services directly to individual customers. The IRIDIUM subscriber units consist of hand held portable units, vehicular mobile units, transportable units and pager units. Services proposed to be offered include radio determination services, emergency services, tracking services, global paging, voice and data services, and interconnection with the public switched telephone network. Motorola is also requesting waivers of Sections 25.202(a)(2) and 25.392(f) of the rules, 47 C.F.R. §§ 25.202(a)(2) and 25.392(f), to permit the IRIDIUM system (1) to use both uplinks and downlinks in the 1610-1626.5 MHz band and (2) to allow the use of non-spread spectrum techniques.

Construction would begin in 1992 with the first satellites being completed and launched in 1994 and the final group in 1996. Testing of the system is proposed to be completed in 1996 with communication services beginning in 1997.

ELLIPSAT CORPORATION — File No. 11-DSS-P91(6)

Ellipsat has filed an application for authority to construct its ELLIPSO I satellite system, an elliptical orbit satellite system consisting of six miniature Eyesat-class satellites. To operate its system, Ellipsat proposes to use spread spectrum techniques in the following frequency bands:

Earth-to-space (uplink):	1610-1626.5 MHz
Space-to-Earth (downlink):	2483.5-2500 MHz

Services proposed to be provided include radio determination satellite service (RDSS) and mobile satellite voice services capable of interconnecting with the public switched network and cellular mobile telephone switching offices within the continental United States and domestic off-shore points. Ellipsat requests a waiver of the U.S. Table of Frequency Allocations to allow non conforming voice services to be provided in the 1.6 GHz band. Access to the ELLIPSO I system is proposed to be offered through value added partners (VAPs) who will sell ELLIPSO services to end users. Service is to be provided over low-cost satellite/cellular units for new customers or by adding an additional RF unitand antenna to existing cellular systems.

Ellipsat proposes to construct its ELLIPSO I system commencing November 1991 with construction to be completed by May 1993 and launch by September 1993 (based on a September 1991 grant of construction authorization).

Comments or petitions regarding these applications may be filed on or before June 3, 1991. Replies and oppositions may be filed on or before July 3, 1991. Responses may be filed on or before July 22, 1991.

Pursuant to Section 25.392(b) of the rules, 47 C.F.R. § 25.392(b), interested parties wishing to file applications for satellite systems to provide RDSS service in the 1610-1626.5 MHz and 2483.5-2500 MHz bands to be considered concurrently with Motorola's and Ellipsat's applications may do so on or before June 3, 1991. Each applicant must file a concrete, comprehensive proposal for its proposed system, describing in detail all pertinent technical and operational aspects of the system and its ability to proceed expeditiously with construction and launch. In particular, applicants shall provide all information specified in Appendix B of Space Station Application Filing Procedures, 48 Fed. Reg. 40256 (September 6, 1983), except that in lieu of demonstrating compliance with 2 spacing, applicants shall demonstrate that their systems are compatible with licensed RDSS systems pursuant to Sections 25.392(a) and (f) of the Commission's rules, 47 C.F.R. §§ 25.392(a), (f). Applications that fail to comport with these requirements as of the cut-off date will be dismissed as unacceptable for filing. Applicants filing by the cut-off date will be afforded an opportunity to amend their applications, if necessary, to conform with any requirements and policies that may be adopted for satellite systems in these bands.

For further information, contact Kathleen Campbell at (202) 634-1624.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Transmittal No. 501
Operating Companies

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: March 29, 1991; Released: March 29, 1991

By the Chief, Common Carrier Bureau:

1. On December 21, 1990, the Ameritech Operating Companies (Ameritech) filed Transmittal No. 501 to introduce a new Packet Switched Network Service feature, Call Detail Recording (CDR), and to expand Ameritech's existing offerings of optional packet service features and functions into additional states. The CDR feature provides the packet service customer with a record of calls made to its data terminal number. The introduction and expansion of packet service features is characterized by Ameritech as a step toward implementation of its Open Network Architecture (ONA) plan, which was approved by the Commission in Filing and Review of Open Network Architecture Plans, CC Docket No. 88-2, Phase I, 5 FCC Rcd 3103 (1990). Ameritech Documentation and Justification at 1. The tariff transmittal is scheduled to become effective on March 30, 1991.

2. In its joint petition against Transmittal 501 and other Ameritech transmittals not considered here,[1] Prodigy Services Company (Prodigy) states that it provides interactive online information services to consumers and small businesses, and that its service delivery options will be affected by the Ameritech filings. Prodigy asserts, without distinguishing between Transmittal 501 and the other Ameritech transmittals it opposes, that the filings cannot be permitted to become effective until the Commission has resolved pending proceedings directed to the creation of access charge subelements for ONA[2] and Ameritech's request for waiver of Sections 69.106(b) and 69.205(c) of the Commission's Rules.[3] Prodigy Petition at 4-5.

3. Ameritech states in its reply that its packet service offerings are provided within the Special Access category, which allows for the unbundling of packet service elements without the requirement of a waiver of the referenced Sections of Part 69, and similarly may take effect without action on the *ONA Part 69 Rule Making*. Ameritech Reply at 4 n.11.

4. The Common Carrier Bureau has reviewed Ameritech Transmittal 501, the petition filed by Prodigy, and Ameritech's reply. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to warrant rejection, or that an investigation is warranted at this time.

5. Therefore, IT IS ORDERED that the petition to reject or suspend and investigate the Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 501, filed by Prodigy Services Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Ameritech Transmittals 499, 500, and 509 implement ONA for Switched Access services.

[2] Amendment of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, *Notice of Proposed Rule Making*, 4 FCC Rcd 3983 (1989) (*ONA Part 69 Rulemaking*).

[3] Public Notice, Pleading Cycle Established for Comments on Ameritech's Petition for Waiver of Part 69 Rules Concerning Local Switching, DA 90-979, released July 31, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 3, 1991

TREATMENT OF *EX PARTE* CONTACTS IN PROCEEDINGS REGARDING AT&T'S TARIFF FCC NO. 12

Consistent with Section 1.1206(b)(6) of the Commission's Rules, 47 C.F.R. § 1.1206(b)(6), the Commission's pending investigation of AT&T Communications Company's Tariff No. 12 in CC Docket No. 87-568 is a non-restricted proceeding. *See* AT&T Communications Tariff FCC No. 12, Rates and Regulations for Virtual Telecommunications Network Service, CC Docket 87-568, 3 FCC Rcd 998 (Com. Car. Bur. 1988) at paragraph 36. Pursuant to Section 1.1208(c)(1)(i)(B) of the Commission's Rules, 47 C.F.R. § 1.1208(c)(1)(i)(B), formal complaints are restricted proceedings. The following formal complaints raise certain Tariff 12 issues:

US Sprint Communications Company Limited Partnership v. AT&T Communications, File No. E-90-113

MCI Telecommunications Corporation v. American Telephone and Telegraph Company, File No. E-91-036

US Sprint Communications Company Limited Partnership v. American Telephone and Telegraph Company, File No. E-91-63

In order to avoid possible confusion and uncertainty on the part of the public, and in light of the unique circumstances present in these proceedings, both the CC Docket No. 87-568 tariff investigation before the Commission pursuant to the Court remand in MCI Telecommunications Corp. v. FCC, No. 89-1382 (D.C. Cir. Oct. 23, 1990) and the formal complaint proceedings listed above will be treated as non-restricted proceedings, effective upon release of this Public Notice. Except as provided during the Sunshine Agenda period (*see* 47 CFR § 1.1203), *ex parte* presentations are permissible in non-restricted proceedings if the disclosure requirements specified in Section 1.1206 of the Commission's Rules, 47 CFR § 1.1206, are met.

This action is taken pursuant to Section 1.1200(a) of the Commission's Rules, 47 C.F.R. § 1.1200(a), which permits the Commission, in its discretion, to adopt modified *ex parte* procedures in particular proceedings if the public interest so requires.

For further information contact: Sally Jane Novak at (202) 632-4887.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 4, 1991

Report No. DS-1072

MOBILE SATELLITE SERVICE PROCEEDING

On March 19, 1991, the Court of Appeals for the District of Columbia Circuit remanded for further consideration two aspects of the Commission's decisions in *Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for, and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services*, 2 FCC Rcd 485 (1987) (*Second Report and Order*), 4 FCC Rcd 6029 (1989) (*Policies Reconsideration Order*), and 4 FCC Rcd 6041 (1989) (*Authorization Order*). In these decisions, the Commission adopted policies and procedures for licensing a mobile satellite service (MSS) provider in the upper L-band frequencies (1545-1559/1646.5-1660.5 MHz), affirmed the dismissal of three applicants, and issued a license to American Mobile Satellite Company, a consortium made up of eight of the eleven applicants. In its decision, the Court vacated the Commission's consortium rules and the requirement that applicants make a $5 million cash contribution into the consortium in order to participate. The Court also reversed the dismissals of the applications that had been filed by Global Land Mobile Satellite, Inc., Globesat Express and Mobile Satellite Service, Inc.

The Commission is currently reviewing these portions of the proceeding in accordance with the Court's opinion. Parties directly affected by the Court's decision are invited to submit their views regarding how the Commission should proceed in light of the Court's decision. Accordingly, American Mobile Satellite Corporation and those entities that filed applications to construct and operate MSS systems by the April 30, 1985 cut-off date and whose applications were considered in the *Policies Reconsideration Order* and the *Authorization Order* may file relevant comments on or before April 11, 1991. Reply comments may be filed on or before April 18, 1991. Parties filing comments should serve copies of their pleadings on all other parties to this proceeding. Parties should also provide copies of their pleadings to each Commissioner; the Office of the General Counsel; The Office of the Bureau Chief, Common Carrier Bureau; and the Satellite Radio Branch, Common Carrier Bureau.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 10, 1991

FOURTH INTERIM REPORT ON ADVANCED TELEVISION SERVICE RELEASED

The Commission has released the main text of the Fourth Interim Report of the Advisory Committee on Advanced Television Service (minus the appendices). The report was adopted at a meeting of the Advisory Committee on April 1, 1991.

In that report, the Advisory Committee presents descriptions of ATV proponent developments, sets forth a brief progress report on the work of the Advisory Committee and its various constituent elements, and discusses the preparations being made by the various testing laboratories.

The complete report is available from the Commission's contractor for public record duplication, Downtown Copy Center, with offices in the FCC Headquarters, 1919 M Street, N.W., Room 246, Washington, D.C. Orders may be placed at (202) 452-1422. Members of the press may contact the Commission's Office of Public Affairs, 1919 M Street, N.W., Room 202, Washington, D.C. The complete report will also be made part of the record in MM Docket 87-268, and may be viewed at the Dockets Reference Room (Room 239) in the Commission's Headquarters during regular business hours.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2051

Revisions to Tariff F.C.C. No. 68

ORDER

Adopted: April 9, 1991; **Released: April 9, 1991**

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 4, 1990, Southwestern Bell Telephone Company (SWB) filed Transmittal No. 2051, a mid-course submission to retarget its price cap rates to earn the authorized rate of return (ROR) for the remainder of the July 1990 through June 1991 tariff period. On December 19, 1990, MCI Telecommunications Corporation (MCI) and US Sprint Communications Company Limited Partnership (Sprint) filed separate petitions to reject, or in the alternative, suspend and investigate, and American Telephone and Telegraph Company (AT&T) filed a petition to suspend and investigate. SWB filed its reply on December 31, 1990. Transmittal 2051 is scheduled to become effective on April 10, 1991. For the reasons discussed below, we reject Transmittal 2051.

II. BACKGROUND

2. On November 1, 1990, SWB, along with the other local exchange carriers (LECs) subject to mandatory price cap regulation under the *LEC Price Cap Order*,[1] filed its initial price cap rates, effective January 1, 1991.[2] In accordance with the requirements of the *LEC Price Cap Order*, SWB used its interstate access rates as they existed on July 1, 1990 as the starting point for its price indexes under price cap regulation. [3]

3. Transmittal 2051 would revise the base rates that SWB used to develop its initial price cap rates. SWB argues that the July 1, 1990 rates are not appropriate as the starting point for price caps since those rates fail to produce the authorized ROR for the July 1, 1990 through June 30, 1991 tariff period ("tariff period"). SWB says a modification of those rates is necessary to avoid a continuation of built-in underrecovery during the entire four-year initial price cap period. Description and Justification (D&J) at Section 1.

4. Based on actual revenues from July 1990 through October 1990 and estimates for November 1990 through June 1991, SWB projects that it will have a ROR of 10.83 percent if current rates remain in effect, while the authorized, blended ROR is 11.62 percent.[4] According to SWB, this represents a $37.6 million revenue shortfall for the tariff period.[5]

5. SWB's revenue requirements for July through December 1990 were developed by multiplying the actual data for July through October by two. *Id.* at Section 2.A.3. Estimates for January through June 1991 are based on SWB's Operational Budget View for 1991. *Id.* at Section 2.A.4. Revenues for the tariff period were developed based on four months of actual data and projected data for the remaining months. Relationships between originating and terminating-rated Common Line (CL) minutes and revenue were developed using a new comprehensive database of billed and earned demand and revenue developed by SWB. Carrier Common Line (CCL) revenues were computed for originating and terminating, premium and non-premium minutes of use based on the revised forecasted demand. *Id.* at Section 2.B.

6. SWB calculated rate adjustment factors (RAF) for the Traffic Sensitive and Special Access Price Cap basket rates. SWB applied these RAFs to the July 1, 1990 rates to develop new July 1, 1990 starting point rates for the 11.25 percent ROR represcription adjustment and the initialization of price cap rates. *Id.* at Section 3.C. SWB also used the revised July 1, 1990 rates as the basis of the Actual Price Index (API) and Service Band Index (SBI) weightings, as well as the initialization of the indexes to 100. SWB calculated revised January 1, 1991 Price Cap Indexes (PCIs) based on the revised July 1, 1990 rates and the represcription, which was treated as an exogenous cost. *Id.* at Section 5.

III. PLEADINGS

A. Petitions

7. AT&T doubts that any adjustment to SWB's rates is required. AT&T argues that since SWB will earn a 11.17 percent ROR for the January 1991 through June 1991 period, which is close to the authorized 11.25 percent ROR for that period, SWB's underearnings would be less than $1.3 million. AT&T Petition at 4-5. According to AT&T, forecasting variations of that size are not unusual, and SWB's forecast is being made on an extremely small amount of data. *Id.* at 5. AT&T also notes that SWB has consistently underforecasted its earnings in the past. *Id.* at 5 n.***. Finally, AT&T complains that SWB did not take into account the effects of demand stimulation due to lower end user rates from the interexchange carriers. *Id.* at 6.

8. Sprint complains that the rate increase is premature, unjustified, and constitutes retroactive ratemaking. First, Sprint argues that it is premature to reset initial price cap rates based on only three to four months of actual data, and that SWB should wait until it has at least six months of data before reassessing its rates.[6] Sprint Petition at 2. In any event, Sprint believes that SWB should only be allowed to adjust its rates to earn a 10.25 percent ROR. *Id.* at 3. Second, Sprint states that SWB's projections are highly questionable. Sprint claims that the magnitude of the change in size of the revenue requirements between the first and second halves of the tariff period, which SWB estimates to more than double, is so dramatic as to cast serious doubt over its validity. *Id.* at 3-4. Sprint also argues that it is not clear which revenue requirements that the Commission disallowed in the *1990 Annual Access Order* that SWB believes were inappropriate and why the Commission should reinstate them now. *Id.* at 4.

Finally, Sprint believes that SWB is trying to earn the entire $37.6 million shortfall in the remainder of the rate period, which would be retroactive ratemaking. *Id.* at 5.

9. MCI alleges that SWB is attempting to make a unilateral change in the starting point for price caps. MCI Petition at 3. MCI asserts that Transmittal 2051 violates the *LEC Price Cap Order* in two ways. First, according to MCI, that Order explicitly found the July 1, 1990 rates to be just and reasonable. MCI notes that the Order contemplated rate adjustments by LECs by allowing them so long as the rates effective January 1, 1991 were at or below the Price Cap Indexes (PCIs). *Id.* at 4. MCI argues that SWB's transmittal violates that rule and should be considered an above-cap filing. *Id.* at 5. Second, MCI states that the Order provided appropriate relief for LECs which underearn, noting that Section 61.45(d)(1)(vii) of the Commission's Rules, 47 C.F.R. § 61.45(d)(1)(vii), allows LECs that are earning under 10.25 percent ROR to adjust their rates to earn at that level. *Id.* at 5.

10. Further, MCI claims that SWB's revenue analysis is fatally flawed, and that instead of having an underrecovery, SWB's current rates will lead to an overrecovery. *Id.* at 7-8. MCI states that it recalculated SWB's semi-annual revenue requirements for the January 1991 through June 1991 period with two adjustments to SWB's estimates -- MCI reduced the impact of the 1991 accounting changes by one-half and used the correct revenue figures for that period -- and found that SWB would overearn by $6.4 million for the six months, or more than $12.7 million on an annual basis. *Id.* at 8-9.

11. MCI states that this discrepancy is due to three basic flaws in SWB's analysis. First, MCI complains that SWB made no attempt to determine what revenues it expected to receive in each half of the tariff period, but simply assumed it will receive revenues in each half in an amount equal to its semi-annual revenue requirement. *Id.* at 9. Second, according to MCI, SWB double counted the effects of the separations and accounting changes that became effective January 1, 1991. Third, MCI claims that SWB used the wrong revenue figures to calculate its ROR for the January 1991 through June 1991 rate period. *Id.* at 10.

B. SWB Reply

12. SWB responds that Transmittal 2051 is not an attempt to avoid the risks associated with price cap regulation, but only seeks to ensure that SWB starts with the proper rates. SWB Reply at 8. SWB argues that the Commission assumed the July 1, 1990 rates were a reasonable starting point for price caps because the Commission assumed that under those rates a LEC would earn the authorized ROR. That assumption was wrong for SWB, however, since the data show that SWB will not earn the authorized ROR with those rates. *Id.* at 2. Indeed, SWB increased its projected shortfall by $7.69 million, based on its actual costs for October 1990.[7] *Id.* at 5-6. Thus, SWB argues that the Commission should recognize that the Commission earnings assumptions were invalid and allow SWB to correct its rates. *Id.* at 3. SWB also argues that the low end adjustment mechanism discussed by MCI and Sprint was not meant as a remedy for dealing with problems with initial price cap rates, and its use would impose an unfair penalty on SWB. *Id.* at 8.

13. SWB contends that AT&T misunderstands the 11.17 percent ROR figure. According to SWB, 11.25 percent is not a proper benchmark since the separations and accounting changes did not become effective until January 1, 1991. *Id.* at 12. Given that the rates were set for the entire rate period, and thus were set to underearn in the first half and overearn in the second half, SWB states that the appropriate ROR for the January 1991 through June 1991 period is 12.26 percent, which results in a revenue shortfall of $25.8 million for SWB. *Id.* at 13. Regarding AT&T's other argument, SWB states that the National Exchange Carrier Association (NECA) calculates that demand stimulation from the interexchange carriers' lower end user rates will account for only $1 million over the six month period in question. *Id.* at 19-20.

14. Concerning Sprint's assertion that SWB is proposing retroactive ratemaking, SWB explains that while it is giving shortfall amounts on an annual basis, it is only seeking to adjust its rates on an ongoing basis. *Id.* at 9. SWB also argues that it is not contesting the Commission disallowances or asking the Commission to change its mind. Those disallowances were based on data before the Commission at that time, and SWB is now presenting the Commission subsequently available actual data and new estimates derived from that data. *Id.* at 10-11.

15. Finally, SWB contends that MCI erred in its analysis of SWB's revenues and costs. First, SWB states that it did not simply assume that SWB will receive revenues in each half of the tariff period in an amount equal to its semi-annual revenue requirement. Rather, SWB argues that revenue levels do not change over the tariff period because of accounting and separation changes, since those changes are averaged over the entire period when the rates are established. *Id.* at 17. Second, SWB denies that it double counted the effects associated with the separations and accounting changes. SWB states that the adjustment it made simply shows the out-of-period recovery that is expected due to incorporating approximately 50 percent of the 1991 accounting and separations effects and the deviations it causes from authorized ROR. *Id.* at 18-19. Third, SWB claims that it did use the correct revenue estimates in its calculations, but that MCI used the estimates from the July 1, 1990 rates, which have been subsequently lowered due to represcription. *Id.* at 14.

IV. DISCUSSION

16. After reviewing Transmittal 2051, the Description and Justification supporting it, the petitions against it, and SWB's reply comments, we conclude that this transmittal must be rejected. We find that SWB's adjustments to its initial price cap rates and indexes are not allowed by the Commission's price cap regulations and violate the *LEC Price Cap Order*.

17. In establishing the price cap rules for the LECs, the Commission concluded that July 1, 1990 rates provided the most reasonable basis for developing initial price cap rates and indexes. *LEC Price Cap Order*, 5 FCC Rcd at 6814 (para. 230). The Commission noted that these rates had been subjected to six years of effort to reform rate of return regulations and noted the type of analysis that these rates went through before the rates became effective. *Id.* at 6815-16 (paras. 233-40).

18. Another important factor in the Commission's decision to use the July 1, 1990 rates was the desire to use an historical date, rather than a prospective one. The Commission chose rates which had already been set to prevent LECs from engaging in any aggregate price increases in the period leading up to price caps. The Com-

mission used this same mechanism when the Commission established price cap regulation for AT&T. *Id.* at 6814 (para. 231). The Commission was concerned that, in the period leading up to price cap regulation, LECs would have strong incentives to increase their rates in a rate of return environment by increasing their costs. These incentives, always present under ROR regulation, would be heightened because the higher the initial price cap rates, the easier it would be for the LECs to cut their costs and increase their rate of return in the initial four-year price cap period. The Commission established the July 1, 1990 rates as base rates in order to avoid giving LECs the wrong incentives.

19. In applying these conclusions to Transmittal 2051, we find that SWB, subsequent to its submission of July 1, 1990 rates, has decided that it will experience greater costs than it previously estimated for the tariff period. Thus, on its face, SWB's transmittal raises the exact issue the Commission addressed when it decided to use July 1, 1990 rates as the starting point for price cap regulation. Furthermore, since the Commission has not guaranteed that those rates will earn the authorized ROR, there is no need for adjustment. The greater rewards available under price cap regulation also pose greater risk; SWB's principal remedy for underearning is to control its costs and stimulate demand. *See id.* at 6794-95 (paras. 65-69).

20. The *LEC Price Cap Order* does not suggest that the Commission expected to adjust the July 1 rates to fine tune rates to the authorized ROR level.[8] Such routine exogenous treatment would have created the kind of incentives the Commission sought to avoid. The *LEC Price Cap Order* does, however, imply that exogenous treatment could be granted in extraordinary circumstances.[9] SWB has not demonstrated extraordinary circumstances that could arguably justify exogenous treatment.

21. The midcourse filing is based in substantial part upon the implementation of new separations studies that produce a larger allocation of costs to interstate services than SWB anticipated at the time SWB prepared its tariffs for the July 1990 - June 1991 access year. The *LEC Price Cap Order* specified that cost changes resulting from a change in the jurisdictional separations rules would be treated as exogenous cost changes for purposes of computing price caps. Those changes do not include new studies based upon unchanged allocations rules. Therefore, exogenous treatment for this kind of cost change is inconsistent with the *LEC Price Cap Order*.

22. Moreover, it appears doubtful that this midcourse would have been accepted in the absence of additional cost justification even if the price caps rules had not been adopted. The Tariff Division has normally refrained from granting special permission to omit some of the data required by Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38, if a midcourse revision was based upon newly introduced separations studies that were not subject to examination in the last annual access filing. Consequently, if this filing were processed in accordance with prior practice, we would be obligated to reject the transmittal for failure to comply with Section 61.38 cost support requirements.

23. Inasmuch as SWB has not provided adequate justification for these rate increases under either the prior rate of return procedures or the new price cap procedures, this transmittal must be rejected.

V. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 2051 IS REJECTED.

25. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL ISSUE revisions to the tariff no later than five business days from the release of this Order removing the rejected material from its tariff. These revisions shall be scheduled to become effective on one day's notice.

26. IT IS FURTHER ORDERED that Special Permission No. 91-275 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED for the purposes of issuing the above revisions.

27. IT IS FURTHER ORDERED that the petitions against Southwestern Bell Telephone Company, Tariff No. 68, Transmittal No. 2051, filed by MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and American Telephone and Telegraph ARE GRANTED to the extent discussed herein, and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order), recon. pending. See also* Commission Requirements for Cost Support Material to be Filed with January 1, 1991 Access Tariff Revisions, 5 FCC Rcd 6480 (Com.Car.Bur. 1990) (*TRP Order).*

[2] Southwestern Bell Telephone Company, Tariff F.C.C. No. 68, Transmittal No. 1970, filed Apr. 2, 1990.

[3] *See* Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Annual Access Order)*; Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Order, 5 FCC Rcd 4142 (Com.Car.Bur. 1990) (*1990 Annual Access Order Revisions)*; Annual 1990 Access Tariff Filings, CC Docket No. 90-320, Memorandum Opinion and Order, 5 FCC Rcd 6015 (Com.Car.Bur. 1990) (*1990 Annual Access Order Erratum).*

[4] The authorized ROR for LECs was lowered from 12 percent to 11.25 percent beginning January 1, 1991. As a result, the authorized level for the entire tariff period, from July 1990 through June 1991, is a blend of these two figures. *See* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, Order, 5 FCC Rcd 7507 (1990).

[5] Subsequent to the filing of Transmittal 2051, SWB revised its projections, and now, based on six months of actual data, it anticipates a $64.2 million shortfall for the tariff period, resulting in a 10.3 percent ROR. Letter to Chief, Common Carrier Bureau, FCC, from D.T. Hubbard, Vice President, Southwestern Bell Telephone Company, dated Mar. 11, 1991.

[6] SWB now has submitted projections based on six months of data. *See* note 5, *supra.*

[7] SWB has further revised this figure based on six months of actual data. *See* note 5, *supra*.

[8] SWB acknowledges that its expected revenues will exceed the revenue requirements allowed by the Commission by almost a half million dollars. D&J at Section 2.

[9] In the Order the Commission stated: "since we decided to conduct a full access filing for July 1, 1990, mid-course corrections during the six-month period leading up to price caps are likely to be premature. We will not give any such correction routine exogenous treatment." *LEC Price Cap Order*, 5 FCC Rcd at 6848, n.315.

Thus, exogenous treatment would be necessary to enable us to accept the transmittal. In the absence of a decision to classify the projected revenue requirement changes as a change in exogenous costs, however, SWB's filing, which reestablishes index levels as of July 1, 1990 for the Price Cap Indexes and Actual Price Indexes, amounts to an unjustified above cap filing.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-544

In re Applications of

HUGHES-MOORE ASSOCIATES, INC.	File No. BPH-870612MC
HERBERT REGENSTREIF	File No. BPH-870615MI
MIDWAY COMMUNICATIONS, LTD.	File No. BPH-870615MT
BELHOUSE & ASSOCIATES, INC.	File No. BPH-870615MV

For Construction Permit for New
FM Station, Midway, Kentucky

ORDER

Adopted: April 8, 1991; Released: April 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board is in receipt of a Motion to Accept Opposition to Petition for Reconsideration, filed March 28, 1991, by Midway Communications, Ltd. By *Memorandum Opinion and Order*, FCC 91R-29, adopted March 21, 1991, the Board denied the subject petition for reconsideration.

2. ACCORDINGLY, IT IS ORDERED, That Midway's Motion to Accept Opposition to Petition for Reconsideration, filed March 28, 1991, IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-515

In re Applications of

RADIO ASSOCIATES, INC.	File No. BPH-880720MQ
DOXA, INC.	File No. BPED-880722MB
ANTHONY J. BOVE, JR.	File No. BPH-880722MJ
HELEN SPARKS QUINN	File No. BPH-880722MP
THE MOODY BIBLE INSTITUTE OF CHICAGO	File No. BPED-880725MB
BULLDOG BROADCASTING, INC.	File No. BPH-880725MD

For Construction Permit for new FM Station, Channel 270A, Brownsburg, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: April 8, 1991; Released: April 18, 1991

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has under consideration an "Appeal," filed March 22, 1991 by Radio Associates, Inc. (Associates), from a ruling by Administrative Law Judge Richard L. Sippel (ALJ) denying its financial amendment for lack of "good cause." *Memorandum Opinion and Order*, FCC 91M-423, released February 4, 1991. Permission to file the appeal was granted by *Memorandum Opinion and Order*, FCC 91M-978, released March 18, 1991. Oppositions has been filed by Anthony J. Bove, Jr. and Bulldog Broadcasting, Inc. The Mass Media Bureau filed comments supporting Associates' appeal.

BACKGROUND

2. When Associates filed its application on July 20, 1988, it certified on its application that it was *not* at that time financially qualified to receive or effectuate the broadcast Construction Permit it nonetheless concurrently sought from this Commission. At no time during the ensuing twenty-six months did Associates bother to seek to amend its pending application to demonstrate that it had since *become* financially qualified or even file any information with respect thereto under Section 1.65 of the rules. In fact, it was not until January 10, 1991 -- approximately two-and-a-half years *after* Associates filed its subject application -- that it sought permission from the ALJ ultimately assigned to conduct the comparative hearing to amend its blatantly defective application to reflect that it had finally acquired the financing necesssary to build and operate the station.

3. By *Memorandum Opinion and Order*, FCC 91M-423, *supra*, and applying Section 73.3522(b)(1) of the rules requiring a strict "good cause" showing to amend once an application is designated for hearing,[1] *see, e.g., Edwin A. Bernstein*, 4 FCC Rcd 8420 (Rev. Bd. 1989) (late financial amendment rejected for lack of "good cause" showing), *review denied*, 5 FCC Rcd 2843 (1990), *aff'd per judgment sub nom. Lefebvre v. FCC*, No. 90-1284, slip. op. filed March 8, 1991; *see also Royce Int'l Broadcasting Co.*, 820 F.2d 1332 (D.C. Cir. 1987) (late engineering amendment rejected), the ALJ rejected Associates attempted amendment. But contending that Section 73.3522(b)(2) of the rules permitted it to freely amend "as a matter of right" within 30 days of the issuance of the *Hearing Designation Order*, 5 FCC Rcd 7399 (released Dec. 10, 1990), which order expressly reflected the still outstanding financial issue against it, Associates' argued there (and here) that no "good cause" showing was required for the filing or the acceptance of its January 1991 financial amendment. Although the Commission's Mass Media Bureau supported Associates' legal argument, the ALJ rejected it. *Memorandum Opinion and Order*, FCC 91M-978, released March 18, 1991.[2] Hence, unless the ALJ is reversed and Associates is permitted to now amend its fatally defective application to demonstrate the acquisition of basic financial qualifications, its application is effectively at an end. *Edwin A. Bernstein*.

DISCUSSION

4. Without denying the possible existence of a facial ambiguity as between the first two subsections of § 73.3522(b) of the rules, we believe that the ALJ's interpretation requiring a "good cause" showing from Associates prior to amendment is clearly the legally correct position. Unlike subsection (b)(1), Section 73.3522(b)(2) (emphasis added) provides:

> In comparative broadcast cases (including comparative renewal proceedings), amendments relating to issues *first raised* in the designation order may be filed as a matter of right within 30 days after that Order, or a summary thereof is published in the Federal Register, or by a date certain to be specified in the Order.

5. Here, of course, Associates argues that the financial issue against it was "first raised" by the Commission in the December 1990 *Hearing Designation Order*.[3] But in rejecting a nearly identical argument *from the Commission itself* in *Cleveland Television Corp. v. FCC*, 732 F.2d 962, 965 n.2 (D.C. Cir. 1984) (emphasis in original), Judge Wald observed:

> This explanation, however, proves too much, for it would apparently permit free amendment as to any issue set-down for hearing by the designation order.

> After all, the purpose of the hearing designation order is to identify issues "requiring an evidentiary hearing." By contrast, the regulations permit amendment as to "issues first *raised* " in the designation order, not issues first set down for hearing in the order.

6. We therefore regard as plainly untenable any notion that the financial issue against Associates was "first *raised*, " as opposed to merely "first *set down*, " in the instant *Hearing Designation Order*. It was Associates itself that "first *raised* " its own lack of financial qualifications by certifying in the negative on its July 1988 application form. Far from being deprived of actual notice of its critical deficiency, it was Associates itself that publicly denied its own credentials in July 1988, and then (apparently) sat back for more than *two years* while this Commission mechanically processed a broadcast application Associates knew to remain fatally defective on its face.[4] This, we believe, is impermissible.

7. As we recently held, again, on very similar facts in *Sharron Annette Haley*, FCC 91R-25, relased March 19, 1991, and as the Commission lately briefed the court in *Lefebvre*, a broadcast applicant "must be ready, willing and able" when it files a broadcast application. This most obviously includes basic finances. *See Tri-State Communications*, 5 FCC Rcd 6232 (1990). And, the law is equally well-settled that when the applicant *knows* of a disqualifying defect in its application, it may not sit back, make no diligent effort to overcome any serious deficiency, allow the Commission to expend valuable public resources to fully process a hollow application, and then hope to be able to amend at its own leisure or convenience. *Compare 62 Broadcasting, Inc.*, 4 FCC Rcd 1768 (Rev. Bd. 1989)(late amendment rejected where applicant certified "no" reasonable assurance of transmitter site, but sought several months later to amend "as a matter of right" and without "good cause" showing). And, an applicant cannot, absent a "good cause" showing, freely amend where the record plainly shows that it *knowingly* lacked reasonable assurance of a vital FCC prerequisite at the very time it filed. *See South Florida Broadcasting Co.*, 99 FCC 2d 840, 845 n.12 (Rev. Bd. 1984); *see generally Pepper Schultz*, 103 FCC 2d 1052, 1056 (Rev. Bd. 1986) (intermediate proceedings on remand omitted), *aff'd per judgment, Pepper Schultz v. FCC*, No. 90-1318, slip op. filed March 21, 1991.[5] For as we iterated in *Dutchess Communications Corp.*, 101 FCC 2d 243, 254-255 (Rev. Bd. 1985)(footnote omitted; emphasis added):

> In the case of changes in [an] application proposal which go to basic qualifying matters, the Commission has recently relaxed its 'good cause' standards, *Anax Broadcasting*, [87 FCC 2d 483 (1981)], but those seeking to avail themselves of the Commission's equity in this regard must make some showing of good faith on their part . . . . *On the other hand, an applicant may not proceed ... without seriously confirming the rudimentary struts of its proposal; and, in the manner of Dickens' Mr. Micawber, hope that 'something will turn up.'*

8. Our reading of the rules and the case precedent squares-up at all corners with the holding of the ALJ. The operative principles, self-evident in most respects, are once again as follows: An applicant is expected to be fully qualified at the time of filing. *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1968). If it is not, and clearly knows of a vital deficiency, it is expected to use all due diligence to overcome a defect "from the time an applicant is . . . apprised of the problem." *Brownfield Broadcasting Corp.*, 88 FCC 2d 1054, 1058 (1982). It may not file a fatally defective application, remain inert while the Commission mechanically processes that defective application, and then *years later* seek the primary assets it needed to be qualified in the first instance. *Edwin A. Bernstein* ; *Sharron Annette Haley* ; *Royce Int' l. Broadcasting*. As the Commission quite logically stated in *Chudy Broadcasting Corp.*, 58 RR 2d 133, 135 (1985): "The purpose of the good cause [amendment] requirement is to promote the expeditious disposition of hearing cases by freezing the applicants' proposals . . . That purpose would be frustrated if applicants were permitted to . . . ignore[ ] defects in their proposals, in the absence of good cause for correcting those defects." Inasmuch as Associates has not even alleged "good cause" for its post cut-off date amendment, and because we fully subscribe (as obligatory in any event) to Judge Wald's reading of Section 73.3522(b)(2) in *Cleveland Television*, we affirm the rejection of Associates' belated attempt to freely amend its July 1988 application, an application, at least on its face, unworthy of prolonged consideration. *See generally* 47 U.S.C. § 308(b) ("applications for station licenses . . . *shall* set forth facts . . . as to the . . . financial . . . qualifications of the applicant")(emphasis added).[6]

9. Because this may not have been clear to Associates, we will remand its application to the ALJ where it will be entitled to attempt a "good cause" showing, with a key focus on the timely steps it took *(if any)* after application filing to overcome its declared financial in ability. *See, e.g., Carol Sue Bowen*, 6 FCC Rcd 10, 11-12 (Rev. Bd. 1991). If shows true diligence in acquiring the financing it now claims to have (by the diligence standards used in the multitude of past cases), the ALJ might permit the amendment.

10. ACCORDINGLY, IT IS ORDERED, That the Appeal filed March 22, 1991 by Radio Associates, Inc. IS DENIED to the extent indicated herein; and that this matter IS REMANDED to the Presiding Officer for further action consistent with this opinion.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The six-prong "good cause" test, first set out in the routinely-cited *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (1970), requires an applicant amending *after* designation for hearing to affirmatively show: (1) due diligence; (2) involuntariness; (3) no modification or addition of issues or parties needed; (4) no disruption to hearing or need for additional hearing; (5) no unfair prejudice to other parties; and (6) no competitive advantage gained. This test is now incorporated, and set out in full, in § 73.3522(b)(1) of the rules.

[2] The ALJ had earlier refused Associates' request to appeal his amendment rejection to this Board. *Memorandum Opinion and Order*, FCC 91M-922, released March 12, 1991. His most recent order, of course, effectively allowed this appeal.

[3] The *Hearing Designation Order* did contain the yet lingering financial issue against Associates. *See* 5 FCC Rcd at 7400.

[4] We are deeply puzzled by the position taken by the Mass Media Bureau in support of Associates before the ALJ. Not only is its interpretation of § 73.3522(b)(2) in conflict with the court's definitive interpretation in *Cleveland Television*, it seems patently illogical. As the ALJ opined:

> Consider the anomalous result of Associates' argument if accepted. An applicant could check "No" and have an amendment rejected for failing to show good cause if it is made anytime before publication of the designation order. But if the applicant waits until after publication, no matter how long the application was pending with a "No" certification, an amendment of right could be made during the 30 day window without showing good cause. Thus, under Associates' argument, there is a disincentive to file an amendment while the application is pending with the Bureau.

Memorandum Opinion and Order, FCC 91M-922, released March 12, 1991. Nowhere does the Bureau dispute the ALJ's analysis. Or, as Bove's Opposition posits (at 3 n.3):

> To take the position advocated by Associates and the Bureau would severely prejudice the other applicants in this case, as well as other FCC applicants, who affirmatively certified their financial qualifications when they filed their applications. By adopting this position,no applicant need certify "Yes" to its financial qualifications when it submits its application. Instead, an applicant can sit back and do nothing until after a hearing is designated. If that were the law, why should any applicant bother to comply with the Commission's stringent financial requirements during the often hectic period before the application deadline?

Why indeed? We also note that the *Edwin A. Bernstein* applicant was not permitted to amend, even where the Bureau's designation order completely neglected to specify a financial issue pursuant to a negative certification, a careless processing error it repeated in the recent *Sharron Annette Haley*. It would appear equally anomalous to require a "good cause" amendment showing where the Bureau neglects altogether to specify a financial issue necessitated by a negative application certification, but to ignore that ordinary "good cause" requirement where the Bureau manages to avoid that identical negligence. A final irony is this: In processing FM broadcast applications, the Bureau employs a "hard look" doctrine, meaning that even the most *innocent* flaw in an application will result in summary dismissal of that application. The *singular* purpose of this ultrarigid processing standard is to "make more efficient use of staff and other resources at a time when the Commission is experiencing a large influx of FM applications." *R.A.D. Broadcasting Corp.*, 4 FCC Rcd 4772, 4773 (1990)(application dismissed because problem not overcome within 30 days of *application filing), appeal dismissed* No. 89-1413 (D.C. Cir. Feb. 27, 1990). Here, the Bureau would have the ALJ freely permit a critical amendment two-and-half years after filing, even where the applicant was fully aware of a fatal deficiency, not simply some innocuous oversight. *Non sequitur*. As between Judge Wald's interpretation of § 73.3522(b)(2) and the Bureau's contrary interpretation here, we unquestionably (and unquestioningly) accept the former.

[5] Nor do we draw a different inference from footnote 6 of the Commission's recent *Aspen FM, Inc., FCC 91-68, released* March 21, 1991 or from the more recent *Scioto Brothers Limited Partnership*, FCC 91-99, released April 4, 1991. Although the *Aspen FM language* there cited § 73.3522 (b)(2) as "[o]ne exception" to the "good cause" showing requirement of its companion subsection (b)(1), it neither discussed, nor did it intend to, we believe, the situation at bar in which an applicant is acutely aware of its own declared deficiency, but makes no diligent attempt to correct that deficiency until after designation for a multiparty comparative hearing, even if the hearing itself is not set until several years later. To so interpret the rules would make a sorry mockery of the Commission's persistent demands for applicant diligence. *See, e.g., California Broadcasting Corp.*, 6 FCC Rcd 283, 284 (1991)("we encourage applicants in other proceedings to evaluate their postures with respect to the standard comparative issue and any basic qualifying issues and to address any [known] problems promptly"). *Scioto Brothers* also differs markedly from the situation at bar. There, all of the applicants were the subject of a purely r andom check of their individual financial certifications, *see Public Notice*, 62 RR 2d 638 (1987); a financial issue was added against one of the applicants (Perkins) because the bank letter he submitted pursuant to the random check did not specify a specific interest rate. Until the hearing designation order "first raised" the question of the sufficiency of that particular applicant's bank loan agreement, he had no notice whatever of a perceived deficiency in his financial proposal. Under those circumstances, the applicant was permitted to file a purely "technical" qualifying amendment within 30 days of the issuance of the *Hearing Designation Order*, a routine allowance we have long recognized and recently explained again. *See, e.g., Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6322 & n.36 (Rev. Bd. 1990); *Albert E. Gary*, 5 FCC Rcd 6235, 6236-37 (Rev. Bd. 1990). In fact, the text of *Aspen FM* (at para. 12; emphasis added; footnote omitted) is but a reprise of our own analysis in *Mableton and Gary*, that is:

> Prior to 1981, before the Commission adopted its (now-abandoned) certification procedures, 50 RR 2d 381 (1981), the Commission generally followed a liberal amendment policy in mutually exclusive broadcast cases, which permitted applicants to remove fatal deficiences in their financial proposals. At that time, applicants could amend the financial proposals during the hearing in response to financial issues specified against them. However, applicants were then also required to include a fairly detailed financial proposal as part of their applications. This [liberal amendment] practice changed with the adoption of the certification procedures.

[6] The Bureau maintains that, because *Cleveland Television* was decided before the adoption of the Commission's "hard look" processing regime, the court's very precise interpretation of § 73.3522(b)(2) is not controlling. In fact, says the Bureau, under the "hard look" regime the Bureau would have returned, without consideration, any Associates amendment tendered after the initial cut-off date. We are not convinced by these arguments, which resonate as a *post-hoc* justification for a dubious and recently discontinued processing practice. In processing applications, the Bureau's practices must conform to the rules, and not *vice versa*. *Reuters Limited v. FCC*, 781 F.2d 946 (D.C. Cir. 1986). And the court has expressly held that § 73.3522(b)(2) permits free amendment only as to matters "first raised" in the designa-

tion order. If the Bureau's internal practice is out of sync with the rules (as it appears to be), it is the practice that must yield, not the rule. *Reuters* (rule, not generalized perceptions of "fairness," must control, even where agency itself creates misunderstanding by conduct inconsistent with rule). Nor are we moved by the fact that Associates has apparently paid its hearing fee. Either an applicant shows diligence in securing its finances, particularly where a critical deficiency is well-known to an applicant, or it will be found unqualified and forfeit its prosecution expenses. *See, e.g., Aspen FM, Inc., FCC 91-68, released March 21, 1991 (at paras. 10-13); Edwin A. Bernstein; Tri-State Communications.* It therefore behooves FCC applicants not to doggedly persist in the prosecution of an application with known disqualifying defects, and we believe that the prompt disposal of such patently defective applications will go a long way toward expediting the licensing process. *See Chudy Broadcasting,* 58 RR 2d at 134-35 n.7 ("Temporizing with flawed proposals has in the past disserved the public interest....").

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-546

In re Applications of

ANDREW J. GUEST d/b/a ALTAMAHA BROADCASTING	File No. BPH-871223MO
FRED GLADSTONE	File No. BPH-871224MD
STEWART BROADCASTING, INC.	File No. BPH-871224MG

For Construction Permit for a
New FM Station on Channel 299C2
in Darien, Georgia

Appearances

Neal J. Friedman, Esq. on behalf of Andrew J. Guest d/b/a Altamaha Broadcasting; *Stephen C. Simpson*, Esq. on behalf of Fred Gladstone; *Howard A. Topel*, Esq. and *Christopher A. Hott*, Esq. on behalf of Stewart Broadcasting, Inc.; and *Paulette Laden*, Esq. on behalf of the Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOHN M. FRYSIAK

Issued: April 9, 1991; Released: April 18, 1991

PRELIMINARY STATEMENT

1. This proceeding involves the mutually exclusive applications of Andrew J. Guest d/b/a Altamaha Broadcasting ("Guest"), Fred Gladstone ("Gladstone") and Stewart Broadcasting, Inc. ("Stewart") for a construction permit for a new FM broadcast station to be operated on Channel 299C2 (107.7 MHz) at Darien, Georgia. The applications of six other applicants for the proposed facility were previously dismissed.[1]

2. The applications were designated for hearing by *Hearing Designation Order*, DA 89-1471, released December 28, 1989 (" *HDO* "), and the following issues, relevant to the remaining applicants, were specified for adjudication in this proceeding;

> To determine which of the proposals would, on a comparative basis, best serve the public interest.
>
> To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. By *Memorandum Opinion and Order* (" *MO & O* "), FCC 90M-483, released March 9, 1990, the following issue was added against Gladstone:

> To determine whether Fred Gladstone has made misrepresentations to and/or lacked candor with the Commission concerning his local residence and, in light of the evidence adduced, whether Gladstone possesses the requisite qualifications to be a Commission permittee.

The burden of proof under the designated issue was assigned to Gladstone (*MO & O*, n. 1).

4. A prehearing conference was held on March 6, 1990 (Tr. 1-9), and hearings were conducted on July 16, and 17, 1990 (Tr. 10-402). The record was closed at the conclusion of the July 17, 1990 hearing session (*Order*, FCC 90M-2141, released July 20, 1990). The record was reopened on August 13, 1990, for the limited purpose of accepting one corrected exhibit and two supplemental exhibits and was closed again the same day (*Order*, FCC 90M-2471, released August 13, 1990).

FINDINGS OF FACT

BASIC QUALIFYING ISSUES

Misrepresentation and/or Lack of Candor - Gladstone

5. In his application filed December 24, 1987, in response to the question requesting the "[n]ame and residence of the applicant," Gladstone identified as his residence address a post office box located in Darien, Georgia (Stewart Ex. 15, p. 3). In the *HDO*, released December 28, 1989, Gladstone was directed to submit additional information concerning his proposal (Stewart Exs. 11 and 16). Specifically, the *HDO* pointed out that a post office box was an insufficient specification of an applicant's home or residence address, and directed Gladstone to file an amendment providing that information (Stewart Ex. 16, p. 2, ¶ 9).

6. On January 29, 1990, Gladstone amended his application in response to the *HDO*'s direction that he provide an accurate description of his home or residence address (Stewart Ex. 17, pp. 1-5; Tr. 165). In the amendment, Gladstone supplied his residence information to the Commission as follows: "Ridgeville Community, Highway 99, Darien, Georgia 31305." (Stewart Ex. 17, pp. 3, 7). In his opposition to Stewart's motion to enlarge issues against Gladstone, Gladstone made representations some of which were disputed in a subsequent reply and inquiry into Gladstone's allegation was deemed warranted (*MO & O*, FCC 90M-483, released March 9, 1990).

7. In his integration statement, Gladstone certified that he "has lived in Darien, Georgia, since 1962." (Stewart Ex. 12, pp. 1, 6). Based on that representation, Gladstone further certified that he would seek 100% quantitative integration credit "qualitatively enhanced by his long-term local residence in the community of license." (Stewart Ex. 12, pp. 2, 7). When he made that statement, Gladstone knew that he was seeking enhancement for living in Darien (Tr. 124).

8. In his direct case, Gladstone testified that he did not live within the exact city boundaries of Darien (Gladstone Ex. 2, p. 1). Gladstone contends that "any confusion

regarding my residence was wholly unintentional." (Gladstone Ex. 2, p. 1). He offered several explanations for his misstatement of residence. First, Gladstone stated that the address provided in his application is his mailing address (*Id.*). Having been made aware from the explicit statement in paragraph 9 of the *HDO* that the Commission's application form called for the location of his residence, which a mailing address consisting of a Post Office Box No. would not provide, Tr. 159, Gladstone reported:

> I live in Ridgeville Community. Ridgeville Community is 1.5 miles from the Darien city limits. I reside 1.9 miles from those city limits and 2.9 miles from the heart of Darien.

(*Id.*).

9. At the hearing, Gladstone testified that his previous statement that he votes in Darien did not refer to his regular polling place as a resident of Ridgeville, but rather to the location where he has deposited absentee ballots (Gladstone Ex. 2, pp. 3-4). Gladstone has voted by absentee ballot approximately eight times since 1962 when he first resided in Ridgeville (Gladstone Ex. 2, pp. 2-4). Although absentee ballots may be executed and returned by mail to the McIntosh Count Board of Registrars, which is located in the McIntosh County Courthouse in Darien (Tr. 136), Gladstone has opted instead to deliver his absentee ballots to the Board at the Courthouse (Tr. 135, Gladstone Ex. 2, p. 3). In fact, the absentee ballots of all McIntosh County residents, whether they reside in Darien or not, must be deposited at the County Courthouse. When he does not vote by absentee ballot, Gladstone votes at a ballot box located outside the City of Darien (Tr. 132-35).

10. In his opposition to Stewart's motion, Gladstone also represented that his five children attended "Darien public schools." (Stewart Ex. 13, p. 11). However, the record indicates that area public schools are operated by the McIntosh County Public School System (Tr. 149). Gladstone attempted to justify his statement that his children attended Darien schools stating:

> I was referring to location when I said Darien public schools, not as to who operated the schools.

(Tr. 153).

11. At hearing Gladstone allowed that he is aware of numerous distinctions between residence in Darien, and in Ridgeville. As a resident of Ridgeville, Gladstone knows that he is governed by the County Commissioners, a different body from the one that governs Darien (Tr. 154). He knows that Ridgeville is served by a different police department (Tr. 155). He knows that Ridgeville uses septic tanks, and is not on the Darien sewage system (*Id.*). And, he knows that Ridgeville is not served by Darien trash collection (*Id.*).

12. Gladstone first learned of the availability of the Darien FM channel from his friend Clarence T. Barinowski ("Barinowski") (Tr. 178; Joint Ex. 2, p. 24). After informing him that the channel was available, Barinowski gave Gladstone advice about how he could apply for the station (Joint Ex. 2, pp. 30-31). Barinowski was aware that residence in the community of license is an important factor in the application process from his experience as an applicant in other comparative proceedings (Joint Ex. 2, p. 33). Gladstone recalled having at least two conversations with Barinowski about the Darien channel prior to the time that he filed his application (Tr. 179). Barinowski also testified that, based on his experience as an applicant in other proceedings, he probably told Gladstone that he would be a good applicant because he was a resident of Darien (Joint Ex. 2, p. 33).

13. During the hearing Gladstone testified that, notwithstanding his deposition testimony, he was not actually sure when or from whom he had learned that living in Darien would strengthen his application (Tr. 208). However, he was certain that at least sometime in the first half of 1988, after filing his application, learning who his opponents would be and reviewing documents describing how the Commission decides cases, he knew that residing in Darien would be a positive factor for his application (Tr. 208-12).

Standard Comparative Issue

Andrew J. Guest

14. Guest is a sole proprietor.

15. *Integration*. Guest will be general manager of the proposed station, devoting full time -- 40 hours or more per week -- to discharging over-all responsibility for the day-to-day operation of the proposed station, with specific responsibility for hiring and supervising the station's sales staff, establishing sales projections, goals and pricing policies, overseeing the station's programming, monitoring the station's financial affairs, and providing liaison between the station and local civic organizations (Guest Ex. 1, p. 1).

16. Guest serves as general manager of WDEC (AM/FM), Americus, Georgia, and is 50% owner, President and Director of its licensee, Guest-Maddox Broadcasting, Inc. (*Id.*, p. 1). He has been involved in the management of broadcast stations since 1972 and in the ownership of broadcast stations since 1979, when he and a partner put WKUB(FM), Blackshear, Georgia, on the air (*Id.*, 1-2).

17. If Guest is awarded the construction permit, he will move to Darien (Tr. 18).

18. Guest will install auxiliary power at the studio and transmitter site in order to maintain broadcast operations during power failures (Guest Ex. 2).

19. *Diversification*. Guest is the 50% owner, an officer and Director of five radio stations: WKUB(FM), Blackshear, Georgia; WDEC(AM) and WDEC(FM), Americus, Georgia; and WCOG(AM) and WZBZ(FM), Ridgeland, South Carolina (Guest Ex. 1, p. 2; *Amendment* to Guest Application filed September 14, 1990). In particular, Guest is Secretary/Treasurer, a Director, and 50% shareholder of Mattox-Guest Broadcasting, Inc., licensee of WKUB(FM); Guest is President, a Director, and 50% shareholder of Guest-Mattox Broadcasting, Inc., licensee of WDEC(AM) and (FM); and Guest is President, a Director, and 50% shareholder of Mattox-Guest of South Carolina, Inc., licensee of WCOG(AM) and WZBZ(FM) (Guest Ex. 1, p. 2; Tr. 21-22, 31-32, 37-38, 41, 43). Blackshear, Georgia, is 48 miles from Darien, and the transmitter sites of WKUB(FM) and Guest's proposed Darien station are 38 miles apart (Stewart Ex. 23; p. 3). The 1 mV/m contours of WKUB(FM) and Guest's proposed Darien station will overlap (Stewart Ex. 23, pp. 2-3, 5-7). Americus, Georgia, is 172 miles from Darien, and

the transmitter sites of WDEC(AM) and (FM) and Guest's proposed Darien station are 163 miles apart (Stewart Ex. 23, pp. 3-4). Ridgeland, South Carolina, is 81 miles from Darien, and the transmitter sites of WCOG(AM) and WZBZ(FM) and Guest's proposed Darien station are 91 miles apart (*Id.*).

20. The other 50% owner of Guest's stations is Troy Mattox (Tr. 21-22, 38, 43). In particular, Mattox is President, a Director and 50% owner of Mattox-Guest Broadcasting, Inc., licensee of WKUB(FM) (Tr. 21-22); Mattox is Secretary, a Director, and 50% owner of Guest-Mattox Broadcasting, Inc., licensee of WDEC(AM) and (FM) (Tr. 37-38); and Mattox is Secretary, a Director, and 50% owner of Mattox-Guest of South Carolina, Inc. licensee of WCOG(AM) and WZBZ(FM) (Tr. 42-43). Guest and Mattox have been friends since childhood (Tr. 23).

21. Guest duly apprised the Commission of his intent and commitment, if he is awarded a construction permit for the Darien FM station, to sever his affiliations with the stations listed above, ceasing to serve as officer or director of the station licensees, and in the case of WDEC(AM) and (FM), terminating his service as General Manager. Guest does not propose to divest his non-attributable interest (50% of the non-voting shares) in Voices North, Inc., applicant for a new FM station at Warner-Robins (Guest Ex. 1, p. 2).

Fred Gladstone

22. *Integration*. Gladstone is an individual applicant (Gladstone Ex. 1). He is an itinerant minister and, as such, travels throughout Georgia and the United States speaking at church assemblies and summer camps (Tr. 168-69; Gladstone Ex. 1). For the past 12 years Gladstone has traveled outside the service area of his proposed station on overnight trips an average of one day per week (Tr. 170). In addition, for the entire period that he has lived in Ridgeville, Gladstone has traveled outside the service area every year to attend summer camps (Tr. 169). The camps have ranged in length from five to 42 days and Gladstone has attended between two and seven camps per summer.

23. Gladstone proposes that, in the event this application is granted, he will work full-time, a minimum of 40 hours per week, as General Manager of his proposed station (Gladstone Ex. 1). In that capacity, he states that he will have full and complete management responsibility to ensure that the proposed station is operated in accordance with applicable Federal Communications Commission Rules and Regulations and other applicable laws and regulations, will oversee all aspects of the station's operation, and will have final decision-making authority concerning all policy matters and other matters typically regarded as management responsibilities in the operation of a commercial FM station (*Id.*). Gladstone pledges to curtail all outside activities to the extent necessary to effectuate his integration commitment (*Id.*). However, Gladstone publishes a weekly column in the *Darien News* and intends to continue doing so should his application be granted (Tr. 170, 173, 226).

24. Gladstone is a Caucasian male. (Gladstone Ex. 1).

25. Gladstone has resided in Ridgeville, Georgia, since 1962 (Gladstone Ex. 1; Tr. 106, 165; Stewart Ex. 17, p. 7). Ridgeville is located within the service area of Gladstone's proposed station, but outside of Darien (Gladstone Ex. 1; Stewart Ex. 13, p. 10; Tr. 123, 124). Ridgeville is separated from Darien by the community of Ashintilly (Tr. 133; Stewart Ex. 13, p. 8; Stewart Ex. 15, p. 9; Stewart Ex. 21, p. 9). During the entire time he has lived in Ridgeville, Gladstone has spent the summers at between two and seven camps located outside of the service area for a duration of between five and 42 days per camp (Tr. 168-69). In addition, for the past 12 years Gladstone has traveled outside the proposed service area on overnight trips approximately one day per week (Tr. 170).

26. In his testimony Gladstone states that, for the past seven years, he has been an invited speaker at functions related to U.S. Veterans of WW II, 82nd Airborne Division Association and the 508th PIR Association, particularly commemorative functions occurring on Veterans Day, Memorial Day, and the Fourth of July, and that he has attended meetings of the National Historical Society approximately three times per year (Gladstone Ex. 1). However, the record does not indicate whether these activities occurred within the proposed service area or not (*Id.*) Moreover, the record fails to indicate how frequently Gladstone has been a speaker (*Id.*). The record contains no evidence that Gladstone has any broadcast experience (Gladstone Ex. 1 and 2).

27. *Diversification*. Gladstone has no ownership interest in any medium of mass communications (Gladstone Ex. 1). Gladstone writes a weekly column (see Stewart Findings, ¶ 23), but specifically stated that if there was a conflict between writing his column and running the radio station, he would cease writing the column (Tr. 226).

28. Gladstone first learned of the availability of the Darien channel from a long-time friend, Clarence T. Barinowski, who has assisted in the preparation and prosecution of Gladstone's application (Tr. 178). Barinowski has had experience in applying for radio station licenses. He is the founder and President of Augusta Radio Fellowship, (Joint Ex. 2, p. 12),[2] which is the licensee of four radio stations in Georgia (*Id.*, pp. 9-12). Applications for stations in 13 additional communities in Georgia, Florida, Alabama, and North and South Carolina have been filed either by Augusta Radio Fellowship or by Barinowski as an individual (*Id.*, pp. 17-19).

29. Barinowski discussed the financial aspects of the station with Gladstone, including personnel costs (Tr. 191-92). It was Barinowski who recommended to Gladstone the communications counsel whom Gladstone retained to prosecute his application for a Darien station (Tr. 179). Barinowski recommended the consulting engineers who were retained for the Darien application filed in Gladstone's name (Tr. 180). Gladstone's counsel had represented all of the Augusta Radio Fellowship stations; and with one exception, Gladstone's consulting engineering firm is the one that prepared all but the first of the station applications filed by Augusta Radio Fellowship (Joint Ex. 2, p. 31).

30. With respect to the transmitter site, it was Barinowski who contacted a Mr. Douglas concerning it (Tr. 190). And it was from Barinowski that Gladstone obtained information concerning costs and all financial aspects of station operation, including the cost of personnel (Tr. 192-93; Joint Ex. 2, 38). Gladstone did not know who owned the first site proposed in his application (Tr. 194). He did not know the name of the person contacted concerning the site, on behalf of his application (Tr. 195). When Gladstone's application was amended to specify a changed site, the assurance concerning that site

came from a Mr. Drew Shirley whom Gladstone had not contacted (Tr. 196). Gladstone did not know who contacted him (Tr. 196). He was not aware whether the second transmitter site was on the same or a different parcel of land as the first (Tr. 197).

31. Gladstone could provide little information concerning the payment of fees to his engineering consultant. Gladstone testified that the consultant had not been paid, (Tr. 202) except for one small billing (Tr. 202), which he believed was for some out-of-pocket expenses (Tr. 214). Apart from that, Gladstone has received no bills from his consulting engineer (Tr. 216). Gladstone has only an oral understanding with his engineering consultant regarding services (*Id.*). The consulting firm told Gladstone on the telephone, when he allegedly inquired what the costs were going to be "[Y]ou don't have to worry about that now ..." *(Id.)*. The consulting firm did not indicate to Gladstone when he might have to worry about it (*Id.*).

32. Barinowski provided two checks to Gladstone (Stewart Ex. 2). One, for 1,800 and equal to the Commission's application filing fee, was dated December 21, 1987, two days before Gladstone filed his application (Stewart Ex. 3, pp. 1-2). The other check for 6,000, dated January 16, 1990, closely followed the December 28, 1989 release of the *Hearing Designation Order*, DA 89-1471. The 6,000 check coincided with the amount of the fee required for Gladstone to file his Notice of Appearance. Gladstone's income is derived in part from donations and gifts (Tr. 228). In the years prior to Gladstone's involvement in the Darien project, Barinowski had often made donations to Gladstone (Tr. 229). Barinowski will have no role at the proposed station (Tr. 229) and has no expectation of repayment of the funds he contributed to Gladstone (Tr. 228).

33. *Auxiliary Power.* Gladstone has made no proposal to install auxiliary power equipment at his proposed station (Gladstone Ex. 1 and 2).

Stewart Broadcasting, Inc.

34. Stewart is a Georgia corporation, 51% of whose authorized shares have been issued to John Wayne Stewart ("Mr. Stewart"), the corporation's President and Director, and 49% to his wife, Judy J. Stewart ("Mrs. Stewart"), secretary-treasurer and director. The initial application was filed by Mr. Stewart as a sole proprietorship and was subsequently amended to its present form on February 29, 1988.

35. *Integration.* John Wayne Stewart will work full time, not less than 40 hours per week, as General Manager of Stewart's proposed station (Stewart Ex. 1, p. 2). In this capacity, he will have ultimate supervisory responsibility over all station operations, which will include establishing and implementing station policies; coordinating, directing, and supervising the activities of senior staff in all phases of station operations; evaluating and authorizing commitments and contractual obligations incurred by the station; and serving as the station's Chief Executive officer (Stewart Ex. 1, p. 2; Tr. 309, 310-11).

36. Stewart currently is President of Patriot Forest Products Corporation ("Patriot"), a position in which he has the flexibility to determine his own schedule and amount of time devoted to Patriot (Stewart Ex. 1, pp. 10-11, Tr. 316). To effectuate his integration pledge Mr. Stewart will reduce the amount of time that he devotes to Patriot to no more than ten hours per week concentrated during evening and weekend time periods (Stewart Ex. 1, p. 11; Tr. 312, 314). In this regard, the record establishes that the fulfillment of his commitment to serve as the full time General Manager of Stewart's station has been and remains Mr. Stewart's highest priority (Stewart Ex. 1, p. 10; Tr. 312, 319, 321, 328-29), that Patriot was organized in a manner which was specifically designed to assure that he can satisfy that commitment (Stewart Ex. 1, pp. 10-11; Stewart Ex. 24; Tr. 318, 336), and that Mr. Stewart has in fact made specific arrangements that will enable him to fulfill his full-time employment at Stewart's station (Stewart Ex. 1; p. 11; Stewart Ex. 24; Tr. 318-320, 328-29).

37. To illustrate his earnestness to run a radio station in Darien, Mr. Stewart stated that when the Brunswick Pulp and Paper Company ("Brunswick Pulp") wanted to transfer him to Atlanta in 1988, Mr. Stewart declined the transfer and resigned his employment with that company so he could maintain his residence within the proposed station's service area and be available to take all steps necessary to pursue his application and to commence station construction and operation promptly upon obtaining the construction permit (Stewart Ex. 1; pp. 10-11).

38. Mr. Stewart joined with three other individuals to form Patriot, a small wholesale brokerage firm in which lumber is purchased and sold through telephone calls with buyers and sellers (Stewart Ex. 1, p. 10; Tr. 314-16, 338). Two individuals, Michael Dowdy ("Dowdy") and Elaine Clark ("Clark"), had worked with Stewart at Brunswick and were provided with incentives to assure their remaining with Patriot (Stewart Ex. 24, pp. 1-13, Tr. 336). Dowdy and Clark are experienced in the business and are capable of performing all activities that are required on a day-to-day basis with Stewart's input (Tr. 313, 315-19, 339-40).

39. The only duties Mr. Stewart contemplates are looking at the monthly financial statements and receiving a possible call from Mr. Dowdy (Tr. 339). Dowdy and Clark are both fully aware of Stewart's pending application and of Mr. Stewart's plans to curtail his activities with Patriot and will assume the remainder of Mr. Stewart's current duties to assure that his commitment to work full-time, a minimum of 40 hours per week, at Stewart's proposed station is fulfilled (Stewart Ex. 1. p. 11; Tr. 312, 318-19, 320, 328-29).

40. Judy J. Stewart will work full-time, not less than 40 hours per week, as station manager of Stewart's proposed station (Stewart Ex. 2, p. 1; Tr. 379). In this capacity, she will be responsible for participating in the development of station policies, supervising the day-to-day implementation of those policies, overseeing personnel matters, managing the station's programming and community affairs departments, and directly supervising the station's financial affairs (Stewart Ex. 2, p. 1; Tr. 311, 380-84, 400).

41. Mrs. Stewart is currently employed as an officer of the Barnett Bank of Southeast Georgia (Stewart Ex. 1, p. 4; Tr. 386-388). She serves as both the assistant cashier and head teller of the bank's main office in Brunswick (Tr. 387). In this capacity she is authorized to sign documents on behalf of the bank and has supervisory authority over a staff of eight individuals (Tr. 400-401). In the event that Stewart's application is granted, Mrs. Stewart will terminate her employment with the bank in order to effectuate her integration pledge (Stewart Ex. 2, p. 4). In addition, Mrs. Stewart will subordinate her other activities to this commitment and will reduce or eliminate such activities if necessary to assure that her pledge to work

full-time, not less than forty hours per week, at Stewart's proposed station is fulfilled (Stewart Ex. 2, p. 4; Tr. 392, 394, 398-400).

42. Judy J. Stewart is a Caucasian female (Stewart Ex. 2, p. 4).

43. John Wayne Stewart and Judy J. Stewart are both nearly lifelong residents of the service area of Stewart's proposed station (Stewart Ex. 1, pp. 2-3; Stewart Ex. 2, pp. 1-2; Tr. 301). Mr. Stewart has resided in Brunswick, Georgia, within the proposed station's 3.16 mV/m broadcast contour, for over 45 years (Stewart Ex. 1, pp. 2-3; Tr. 301).

44. In 1964 Mr. Stewart moved to Waycross, Georgia, which is located approximately ten miles outside the station's proposed service area (Stewart Ex. 1, p. 2). After living in Waycross for approximately six months, Mr. Stewart returned to Brunswick, within the proposed service area, where he lived and worked for the next ten years (*Id.*).

45. In 1974 Mr. Stewart moved to Homestead, Florida, to supervise the revitalization of a radio station located in the community (Stewart Ex. 1, p. 3). He remained in Florida for approximately eight months and, after completing his assignment, returned to Brunswick, within the city grade contour of Stewart's proposed station, where he currently lives and will continue to reside should Stewart's application be granted (Stewart Ex. 1, p. 3; Tr. 301).

46. Mrs. Stewart also has resided in Brunswick Georgia, within the proposed station's 3.16 mV/m broadcast contour, for over 45 years (Stewart Ex. 2, pp. 1-2; Tr. 301). In 1964, Mrs. Stewart moved to Waycross, Georgia, approximately ten miles outside the station's proposed service area, where she lived for approximately six months (Stewart Ex. 2, p. 2). She then returned to Brunswick, within the station's proposed service area, where she lived for the next ten years (*Id.*).

47. In October 1974, Mrs. Stewart accompanied her husband to Florida where she lived for approximately eight months (Stewart Ex. 2, p. 2). Following this brief period in Florida, she moved back to Brunswick, Georgia, where she has lived ever since (*Id.*). Mrs. Stewart currently resides within the station's proposed city-grade broadcast contour and will continue to do so should Stewart's application be granted (Stewart Ex. 2, P. 2; Tr. 301).

48. Both John Wayne Stewart and Judy J. Stewart have actively participated in civic activities within the service area of Stewart's proposed station (Stewart Ex. 1, pp. 3-7; Stewart Ex. 2, pp. 2-4). Mr. Stewart currently serves as a volunteer for Hospice of the Golden Isles, Inc., an organization in Brunswick that raises money for the treatment of individuals who are terminally ill and helps to provide counseling for those individuals and their families (Stewart Ex. 1, p. 3; Tr. 287, 323). Mr. Stewart assists on various committees and was recently asked by the director to participate in an auction to raise money on behalf of the organization (Tr. 323-24).

49. Through Stewart Broadcasting, Inc., Mr. Stewart participates in the McIntosh County Chamber of Commerce and, from 1989 to the present, has attended Chamber meetings and seminars in Darien (Stewart Ex. 1, p. 3). Stewart Broadcasting has sponsored "Business After Hours" seminars conducted by the Chamber which provide local businessmen and women with the opportunity to discuss and advance local business and charitable needs and interests (*Id.*, pp. 3-4). Stewart also was a co-sponsor this year of the Chamber's annual new teachers luncheon and Mr. Stewart assisted the Chamber with its annual Blessing of the Fleet Festival (*Id.*, p. 4). The community of Darien is located in McIntosh County (*Id.*).

50. Since 1980, Mr. Stewart has been an active member of St. Mark's Episcopal Church, which is located in Brunswick (Stewart Ex. 1, p. 4). He served as a church usher in 1986 and 1987 and helped to raise funds for the church when it needed to be renovated (*Id.*).

51. Mr. Stewart also has been active in the Brunswick Masons since 1973 (Stewart Ex. 1, p. 4). He is a member of the Masons' Ocean Lodge 214 in Brunswick, the Masons' Royal Arch (an intermediate body), and the Masons' Knights Templar (the organization's highest order), and has helped to organize several charitable events conducted by the Masons for the benefit of Masonic hospitals and Burn Centers (*Id.*). In 1988, Mr. Stewart played a leading role in helping a one year old girl suffering from birth defects to gain admittance to the Masons' private hospital in Atlanta Georgia (*Id.*).

52. Mr. Stewart is a member of the Brunswick/Golden Isles Chamber of Commerce, which he first joined in 1968. He served as a active member of the Chamber from 1968-1974 and renewed his membership again in 1988 (Stewart Ex 1, pp. 4-5). More recently, Mr. Stewart his been a regular participant in the Chamber's monthly "Business After Hours" seminars (Stewart Ex. 1, p. 5; Tr. 324-25). The "Business After Hours" seminars provide local businessmen and women with the opportunity to discuss and advance local business and charitable needs and interests (Stewart Ex. 1, p. 5; Stewart Ex. 2, p. 2).

53. From 1980 until 1988, Mr. Stewart was an active volunteer in the Glynn County United Way Campaign (Stewart Ex. 1, p. 5). During this time he served as a member of the organization's Industrial Group and as Master of Ceremonies at various fundraising events (*Id.*). Mr. Stewart also solicited donations and collected money on behalf of the organization for distribution to numerous local charities (*Id.*).

54. In 1984, Mr. Stewart helped to coordinate the Brunswick appearance of "Up With People," a nationally recognized entertainment troupe that performs variety shows to promote education and family values among young people (Stewart Ex. 1, p. 5). Mr. Stewart worked with the troupe's advance staff to obtain advertising support and also helped to secure the site where the entertainers performed (*Id.*).

55. From 1974 until 1975, Mr. Stewart served as an active member of the Brunswick Exchange Club, which presents an annual fair that raises money for local charities (Stewart Ex. 1, p. 6; Tr. 286). From 1971 until 1975, Mr. Stewart was an active member of the St. Simons Jaycees, a local public service organization that promotes the public welfare within the service area of Stewart's proposed station (*Id.*).

56. Between 1970 and 1975, Mr. Stewart directed a fundraising effort that enabled the Glynn County Police Department to build the County's first forensic science laboratory for the purpose of combatting the growing drug problem in Glynn County; McIntosh County, in which Darien is located; and the surrounding areas (Stewart Ex. 1, p. 6; Tr. 326-327, 330). The laboratory also served as a training school in Glynn County for law enforcement officers (Tr. 30).

57. During this period, Mr. Stewart also helped initiate an annual Easter Egg Hunt that is still being conducted for the benefit of thousands of children within the service area of Stewart's proposed station (Stewart Ex. 1, p. 6).

58. In addition, during this time Mr. Stewart coordinated several fundraising drives which benefited families who lost their homes to fire (Stewart Ex. 1, p. 6; Tr. 335).

59. From 1968 until 1974, Mr. Stewart served as a volunteer member of the Glynn County Fire Department (Stewart Ex. 1, p. 7; Tr. 287). During this time, Mr. Stewart initiated and helped to coordinate a fundraising effort which resulted in the Fire Department being able to acquire emergency equipment for its first ambulance service (Stewart Ex. 1, p. 7; Tr. 335). At the same time, Mr. Stewart served the Department as a volunteer fireman and ambulance driver and attained the rank of Captain (*Id.*).

60. Brunswick and Glynn County are both located within the 1 mV/m broadcast contour of Stewart's proposed station (Tr. 349-50).

61. Since 1987, Mrs. Stewart has been active in the Glynn County/Brunswick Salvation Army and has been a volunteer participant in the Salvation Army's annual Christmas Kettle Fundraising Drive (Stewart Ex. 2, p. 3). In addition, for the past three years, Mrs. Stewart has assisted the National Multiple Sclerosis Society with its banking activities and also has been a member of the Glynn County Heart Association (*Id.*).

62. Since 1942, Mrs. Stewart has been a member of St. Mark's Episcopal Church, which is located in Brunswick. Through the church, she has frequently donated food to the needy and flowers for area nursing home (Stewart Ex. 2, p. 3).

63. Mrs. Stewart was a member of the Brunswick High School Booster Club from 1984 to 1985 and provided transportation, food and help with fundraising to support the high school's athletic programs (Stewart Ex. 2, p. 3; Tr. 390).

64. Mrs Stewart was a member of the Glynn County PTA (Ballard School and Altama Chapters) from 1975 until 1981, during which time she attended meetings, participated in the annual Halloween benefit, helped raise funds for the organization, and provided transportation for field trips (Stewart Ex. 2, p. 3).

65. Between 1970 and 1976, Mrs. Stewart assisted on a volunteer basis the WYNR radio stations in Brunswick with various charitable and civic activities that the stations helped to sponsor, including a concert to raise funds for the United Way, the county-wide Easter Egg Hunt for underprivileged children, and tallying votes for the dissemination of election results (Stewart Ex. 2, p. 3; Tr. 391). Mrs. Stewart subsequently helped with the Easter Egg Hunt on a continuing basis (Tr. 391).

66. Through Stewart Broadcasting, Inc., Mrs. Stewart also participates in the McIntosh County Chamber of Commerce and, from 1989 to the present, has attended Chamber meetings and seminars in Darien (Stewart Ex. 2, p. 2).

67. John Wayne Stewart has nine years of broadcast experience, including experience in managerial positions (Stewart Ex. 1, p. 7). In 1967, Mr. Stewart was hired as an account executive and disc jockey by Southland Radio, Inc. ("Southland"), licensee of Stations WYNR, AM and FM, Brunswick, Georgia (*Id.*) Between 1967 and 1968, he served as the stations' Music Director and subsequently as the stations' Program and Production Director (*Id.*) In 1968, he was promoted to Sales Manager and later that year became the stations' Assistant Manager (*Id.*). In 1972, he was promoted to General Manager and also became Vice President and Chief Operating Officer of Southland (*Id.*). Mr. Stewart was promoted to President and Chief Operating Officer of Southland in 1973 and held these positions until his resignation in 1976 (*Id.*).

68. In 1973, while Mr. Stewart was President of the company, Southland purchased WIII(AM), Homestead, Florida (Stewart Ex. 1, p. 8). Mr. Stewart supervised the reorganization of the station's format and change in call letters to WQDI as well as a general improvement of WQDI's engineering facilities (*Id.*).

69. Between 1970 and 1976, Judy J. Stewart was employed on a fill-in basis for Radio Station WYNR in the stations' billing and traffic departments (Stewart Ex. 2, p. 3). During the period that she lived in Florida, she was employed on a temporary basis for approximately one month, as Officer Manager of Radio Station WQDI, Homestead, Florida (Stewart Ex. 2, p. 3; Tr. 382).

70. *Diversification.* Neither Stewart Broadcasting, Inc., nor either of its principals, John Wayne Stewart or Judy J. Stewart, has any interest in any media of mas communication (Stewart Ex. 1, p. 1).

71. *Auxiliary Power.* Stewart's proposed station will be equipped with emergency auxiliary generating equipment at both the transmitter and the studio sites which, in the event of a partial or complete commercial power failure, will permit the station to provide continuing service to the public (Stewart Ex. 1. pp. 9-10; Tr. 283-84).

Comparative Coverage

72. The parties to this proceeding have stipulated that no comparative coverage preference should accrue to any of the applicants on the basis of the areas and populations that the applicants propose to serve (Joint Ex. 1).

CONCLUSIONS

Basic Qualifying Issues

Misrepresentation and / or Lack of Candor - Gladstone.

73. In his application Gladstone identified as his residence a post office box in Darien, Georgia. The *HDO* directed Gladstone to specify his residence more definitively. In an amendment in response thereto he listed his address as "Ridgeville Community, Highway 99, Darien, Georgia 31305." However, in his integration statement Gladstone asserted that he has lived in Darien, Georgia since 1962. The record discloses that Darien and Ridgeville are separate communities. Ridgeville although within the 70 dBu contour is 1.5 miles from the Darien city limits.

74. The record, however, reflects the many connections Gladstone and his family had with the community of Darien. It is not unreasonable that one with such close ties to a neighboring community would over time consider himself to be part and parcel of that community.

75. Gladstone is a well known minister and a religious columnist for the local Darien News. It simply is not plausible to maintain that he would attempt to deceive the Commission and his highly combative competing applicants after he first correctly related the locale of his

residence. Certainly there is no preponderance of evidence that would warrant a conclusion of deceit on his part.

76. It is deemed that the confusion that arose concerning Gladstone's residence was a result of Gladstone's misunderstanding and that there was no intentional misrepresentation and intent to deceive. The misrepresentation/lack of candor issue *IS RESOLVED* in Gladstone's favor.

Standard Comparative Issue

Andrew J. Guest

77. Mr. Guest has pledged to divest his ownership in all broadcast stations in which be currently holds an attributable interest. Stewart's argument that Guest's divestiture pledge should not be credited because it was contingent on the outcome of Mr. Mattox's Richmond Hill application is rejected. It is speculative to contend that a transfer to Mr. Mattox was Mr. Guest's only intent. Guest was not obligated to make any transfer to Mattox. Mr. Guest divestiture pledge is unequivocal and unconditional. It is also ruled that Guest's pledge to divest also includes his divesting himself of the positions as Director and President of the license of WDEC(AM/FM). Guest will not be assessed any diversification demerit.

78. Mr. Guest is entitled to be credited with 100% quantitative integration credit. His integration proposal is enhanced by his broadcast experience, his proposed future residence in the community of license and his proposal to install auxiliary power at both studio and transmitter site.

Fred Gladstone

79. Gladstone is entitled to 100% full-time quantitative integration credit for his proposal to work full-time as General Manager of the proposed facility. Gladstone's integration proposal is substantially enhanced qualitatively by his long-term local residence within the service area (the 70 dBu contour, in fact) of the proposed station [*Waters Broadcasting Corp.*, 91 FCC 2d 1260, *aff'd sub nom., West Michigan Broadcasting v. FCC*, 735 F. 2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985)] and slightly enhanced by his civic participation. The *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 5 RR 2d 1901 (1986) holds that integration is qualitatively enhanced by residence within the proposed community of license, followed closely by residence within the proposed service area. *Policy Statement, supra* at 396, 5 RR 2d at 1910. Gladstone is not assessed any diversification demerit for his weekly religious column. He has no media interests. The competing applicants dwell on Gladstone's apparent lack of knowledge of some of the aspects of his application and conclude that the person in control of the Gladstone application is Mr. Barinowski. But that is sheer speculation. Is is true that Mr. Barinowski has been generous to Mr. Gladstone, but that is not unusual, and no ill motive is attached to it, in light of the long-term friendship between the two and Mr. Gladstone's status of minister. There is no evidence that Mr. Barinowski will control the proposed station or that Mr. Gladstone intends to abdicate control. There is no evidence that Mr. Gladstone is incapable of running the station. The fact that Gladstone received assistance in the prosecution of his application is not, by itself, reflective of his competence to operate a radio station.

80. Mr. Gladstone has made no proposal to install auxiliary power equipment at his proposed station.

Stewart Broadcasting, Inc.

81. Stewart is entitled to 100% integration credit for the proposed full-time participation of its two stockholders, John Wayne Stewart and Judy L. Stewart. Mrs. Stewart's integration proposal is credible. She has had supervisory experience, has been gainfully employed and has been most active in civic activities. Additionally the record discloses that Mrs. Stewart has been active in Stewart's activities ever since she became a voting shareholder. Additionally Mrs. Stewart's career change was prompted, among other things, by the rumored sale of her employer. As for Mr. Stewart's integration proposal there is no evidence that Mr. Stewart cannot meet his full-time pledge in light of his commitment to continue part time in the Patriot operation. The record is clear that Mr. Stewart's priority is the full-time commitment for the proposed radio station.

82. Stewart's integration credit is qualitatively enhanced by the female status of Judy J. Stewart

83. Stewart's integration credit is also qualitatively enhanced by the long-term past, present and future residence of John Wayne Stewart and Judy J. Stewart in the proposed service area.

84. Stewart's integration credit is also qualitatively enhanced by the civic participation of its principals.

85. Stewart's integration credit is also qualitatively enhanced by past broadcast experience of Mr. Stewart. The record establishes that Mr. Stewart has over nine years of broadcast experience. In addition, the record indicates that between 1970 and 1976 Mrs. Stewart was employed on a full-time basis at Station WYNR, and also that she was employed approximately one month as Office Manager of Station WQDI, Homestead, Florida. Both of those positions enhanced Mrs. Stewart's familiarity with the operation of a broadcast facility and inure to her credit.

86. Stewart is entitled to a preference for its proposal to install auxiliary power.

ULTIMATE CONCLUSIONS

87. Each applicant has been awarded 100% integration credit. None has been assessed a diversification demerit. The award must be made of the basis of enhancement (qualitative) factors. Guest's 100% integration credit is enhanced by his future residence in the community of license and his broadcast experience. He also receives a preference for auxiliary power. Gladstone's 100% integration credit is enhanced by his past and future local residence in the service area. He also receives slight credit for civic involvement. Stewart is credited with 100% past and future local residence in the proposed service area, 100% long term civic participation in the service area, 100% broadcast experience and 49% female ownership and participation. Stewart is also entitled to a preference for auxiliary power. Based on the foregoing assessments, it is clear that Stewart is the winner and its application will be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews the decision on its own motion in accordance with Section 1.276 of the Rules, the application of Stewart Broadcasting, Inc. (File No. BPH-

871224MG) for a Construction Permit for a new FM station on Channel 299C2 in Darien, Georgia IS GRANTED, and the applications of Andrew J. Guest d/b/a Altamaha Broadcasting (File No. BPH-871223MO) and Fred Gladstone (File No. BPH-871224MD) ARE DENIED [3]

FEDERAL COMMUNICATIONS COMMISSION

John M. Frysiak
Administrative Law Judge

FOOTNOTES

[1] The application of Segue Communications, Inc. (File No. BPH-871221MD) was dismissed by *Order*, FCC 90M-1831, released June 27, 1990; the application of Sunny Communications, Inc. (File No. BPH-871222MA) was dismissed by *Order*, FCC 90M-2177, released July 23, 1990; the application of Intermart Broadcasting Golden Isles, Inc. (File No. BPH-871223MP) was dismissed by *Order*, FCC 90M-241, released February 8, 1990; the application of Resort Communications Limited Partnership (File No. BPH-Order, FCC 90M-330, released February 21, 1990; the application of MMC Partnership (File No. BPH-871228MK) was dismissed by *Order*, FCC 90M-1137, released May 10, 1990; the application of Darien Associates (File No. BPH-871228MO) was dismissed by *Order*, FCC 90M-1416, released May 31, 1990.

[2] Joint Exhibit 2, is the Deposition of Clarence T. Barinowski, taken June 27, 1990. It was received in evidence *in toto* (Tr. 147).

[3] In the event exceptions are not filed within 30 days after the release of this Initial Decision and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Rule 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 11, 1991

BELLSOUTH TELEPHONE COMPANIES FILE APPLICATION FOR AUTHORITY TO CEASE OFFERING INTERSTATE "DARK" FIBER FACILITIES

Pleading Cycle Established

On March 1, 1991, BellSouth Telephone Companies, South Central Bell Telephone Company, and Southern Bell Telephone and Telegraph Company (BellSouth) filed an application for authority pursuant to Section 214 of the Communications Act of 1934 and Sections 63.01 *et seq.* of the Commission's Rules to withdraw as a provider of dark fiber facilities.

BellSouth states that it filed its application under protest and believes that a Section 214 certification is not required under the circumstances. It asserts that Section 214 certification would be required only if BellSouth were to "discontinue, reduce, or impair service to a community." BellSouth asserts that, in this instance, all customers for dark fiber provided by BellSouth are carriers. It maintains, therefore, that it is not discontinuing service to the using public, but to its carrier customers. BellSouth states that carrier customers can subscribe to BellSouth's DS3 services which provide a comparable transport medium to dark fiber.

On August 6, 1990, the Commission ordered Southwestern Bell Telephone Company, Bell Atlantic Telephone Companies, BellSouth Telephone Companies, and the Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) to file generally available, averaged rates for dark fiber facilities. BellSouth and the other affected local exchange carriers (LECs) requested waivers of this requirement. The waiver requests were denied on October 26, 1990, and the Common Carrier Bureau ordered the four LECs to file dark fiber rates on November 1, 1990. BellSouth, as required by the Commission, filed general rates for only 30 days following the effective date of such filing. According to BellSouth, the Commission has now suspended this 30-day provision. BellSouth plans to withdraw any dark fiber offering at the earliest of 30 days after the termination of such suspension, the Commission's approval of this application, or the date upon which other approriate relief is granted.

The basic statutory test applied to a Section 214 application to discontinue service is whether the current or future public convenience and necessity will be adversely affected by such a discontinuance. Interested parties are asked to comment on whether BellSouth's discontinuance of dark fiber service would adversely affect the current or future public convenience and necessity. Parties wishing to address this issue should file petitions regarding the BellSouth application no later than May 3, 1991. BellSouth may file an opposition to those petitions no later than May 17, 1991. Replies to any such opposition may be filed no later than May 24, 1991.

Copies of BellSouth's application, along with other related documents, may be obtained from the Downtown Copy Center (DCC). The documents are also available for public inspection and copying in Room 518, 1919 M Street, N.W. An original and four copies of all pleadings must be filed in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each pleading must be filed with DCC.

For further information, contact Darrell Townsley, Tariff Division, Common Carrier Bureau at (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: April 11, 1991

COMMON CARRIER BUREAU RECEIVES COMMENTS ON PRICE CAP SERVICE QUALITY AND INFRASTRUCTURE MONITORING

On March 8, 1991, the Common Carrier Bureau released a Public Notice in CC Docket No. 87-313, seeking comments on price cap service quality and infrastructure monitoring.[1]

On April 10, 1991, comments were filed by the following parties:

Ameritech Operating Companies (Ameritech)

American Telephone and Telegraph Company (AT&T)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corporation (BellSouth)

Boeing Computer Services (Boeing)

Central Telephone Company (Centel)

Cincinnati Bell Telephone Company (CBT)

D.C. Public Service Commission (D.C. PSC)

GTE Telephone Operating Companies (GTOC)

State of Hawaii (Hawaii)

International Communications Association (ICA)

Independent Data Communications Manufacturers Association (IDCMA)

MCI Telecommunications Corporation (MCI)

Michigan Public Service Commission Staff (Michigan)

National Association of Regulatory Utility Commissions (NARUC)

New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)

Pacific Bell and Nevada Bell (Pactel)

Rochester Telephone Corporation (Rochester)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (SWB)

Tele-Communications Association (TCA)

United Telephone Systems Companies (United)

United States Telephone Association (USTA)

Comments replying to these pleadings must be filed no later than April 25, 1991, and should be marked for CC Docket No. 87-313 and for this DA number. An original and four copies of all such comments must be filed with the Secretary of the Commission in accordance with Section 1.51(c) of the Commission's Rules. Parties must also furnish one copy of their comments and replies to Downtown Copy Center, the Commission's duplicating contractor, at its office in Room 246, 1919 M Street, N.W., Washington D.C. 20554, and six copies to the Chief, Tariff Division, Room 518, 1919 M Street, N.W., Washington, D.C. 20554.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] Public Notice, DA 91-299, released March 8, 1991 (*March 8 Public Notice*). The *March 8 Public Notice* noted that in the *LEC Price Cap Order*, the Commission delegated to the Chief, Common Carrier Bureau, authority to establish new reporting requirements designed to capture trends in service quality and telephone industry infrastructure development under price cap regulation, and improve and standardize existing reporting requirements for this purpose. Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, CC Docket No. 87-313, 5 FCC Rcd 6786, 6827-30 (1990) (*LEC Price Cap Order*). The Bureau sought comment on our proposed reporting requirements, which were attached to the *March 8 Public Notice*.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-84

In re Applications of

GRADY LYNN AND CAROL LYNN d/b/a LYNN BROADCASTING (hereafter "Lynn")	File No. BPH-891011MJ
MT. JULIET RADIO PARTNERS (hereafter "MJR")	File No. BPH-891012MK
EDITH M. GELFAND (hereafter "Gelfand")	File No. BPH-891012MN
JAMAL BROADCASTING, L.P. (hereafter "Jamal")	File No. BPH-891012MS
Q. PRIME, INC. (hereafter "Prime")	File No. BPH-891012MT
MT. JULIET BROADCASTING, INC. (hereafter "MJB")	File No. BPH-891012MV
CUMBERLAND BROADCASTING PARTNERSHIP (hereafter "Cumberland")	File No. BPH-891012MW
DAVID J. BOTT AND CARESE C. BOTT JOINT TENANTS (hereafter "Bott")	File No. BPH-891012MX
NEW ERA COMMUNICATIONS GROUP INC. (hereafter "Era")	File No. BPH-891012ND
RITA BROADCASTING COMPANY, INC. (hereafter "Rita")	File No. BPH-891012NE
LORI N. WALKER (hereafter "Walker")	File No. BPH-891012NH

For a Construction Permit
for a New FM Station
on Channel 294A (106. 7 MHz)
in Mt. Juliet, Tennessee

HEARING DESIGNATION ORDER

Adopted: March 26, 1991; Released: April 18, 1991

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. Each applicant in the captioned proceeding was short-spaced to a proposal by WBLG(FM) to operate from Smiths Grove, Kentucky, on Channel 294C2 in lieu of its existing Channel 296A allotment. As an alternative, WBLG(FM) also proposed operation on Channel 296C2. Grady Lynn, one of the applicants in the subject proceeding, filed a counterproposal requesting the allotment of Channel 294A to Mt. Juliet, Tennessee, which conflicts with WBLG's first proposal to operate on Channel 294C2. However, in the *First Report and Order* in MM Docket 88-215, 4 FCC Rcd 5770 (July 28, 1989), the Commission found that Channel 296C2 can be substituted for Channel 296A at Smiths Grove, Kentucky, and, therefore, awarded Channel 294A to Mt. Juliet, Tennessee, as the Community's first FM service. Subsequently, in a *Second Report and Order*, MM Docket 88-215, 4 FCC Rcd 8749 (December 22, 1989), the Commission modified the license of WBLG(FM) to operate on Channel 296C2. Pursuant to the *Second Report and Order*, WBLG(FM) filed a minor change application with the Commission to implement the channel change. That application (BPH-910125IJ) is currently pending with by the Commission. Therefore, in the event of grant of any of the captioned applications for Channel 294A in Mt. Juliet, program test may not commence until WBLG(FM) commences on-air operation on Channel 296C2.

3. *MJR, Rita.* The sites proposed by MJR and Rita in this proceeding are short-spaced to Channel 294A, licensed to FM station WHHT, Cave City, Kentucky. However, in the *Second Report and Order* in Docket 88-215, *supra*, noted above, the Commission modified the license of WHHT(FM) to specify operation on Channel 279A. Subsequently, in response to a petition for Rule Making, filed by the licensee of WHHT(FM), in the *Report and Order*, MM Docket 90-439, 6 FCC Rcd 387 (January 23, 1991), the Commission once again modified the license of WHHT(FM) to specify operation on Channel 279C3 in lieu of Channel 279A. In addition, the licensee of WHHT(FM) was ordered to submit with the Commission within 90 days of the effective date (March 11, 1991) of the Order in Docket 90-439, a minor change application for construction permit specifying the new facility. Therefore, in the event of grant of either the MJR or the Rita application referenced herein, program test may not commence until WHHT(FM) has commenced on-air operation on Channel 279C3.

4. *Gelfand, Jamal, Cumberland, Era.* Each of these applicants are in violation of the ANSI limits. An engineering study based upon OST Bulletin No. 65, October 1985 entitled " *Evaluating Compliance with FCC Specified Guidelines for Human Exposure to Radiofrequency Radi-*

ation " reveals that the ANSI limit of one milliwatt per square centimeter may be significantliy exceeded in the area immediately surrounding the tower base. Consequently, we are concerned that the applicants may have failed to comply with the environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (April 12, 1986). Under these rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in 47 C.F.R. § 1.1307. If the application is determined to be subject to environmental processing under the 47 C.F.R. § 1.11307 criteria, the applicant must then submit an Environmental Assessment (EA) containing the information delineated in 47 C.F.R. § 1.1311. 47 C.F.R. § 1.1307 states that an EA must be prepared if the proposed operation would cause exposure to workers or the general public to levels of RF radiation exceeding specific standards. Since the applicants' proposals may have a significant environmental impact as defined by C.F.R. § 1.307, each applicant herein will be required to submit the environmental impact information described in 47 C.F.R. § 1.1311. These studies must address the total contribution of radiation from all radiofrequency sources on and in the immediate vicinity of the tower. The studies must also include a description of all steps taken to comply with the above mentioned OST Bulletin. In this regard, if the site is presently fenced in compliance with the guidelines, each applicant is required to so state and specify the height and distance from the base of the tower to the fence. Accordingly, Gelfand, Jamal, Cumberland and Era will be required to file, within 30 days of the release of this Order, an EA with the presiding Administrative Law Judge. In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of these cases will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon. denied sub. nom Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

5. *Gelfand.* Gelfand proposes to sidemount her antenna on an existing tower located in Nashville, Tennessee. In her engineering proposal, Gelfand listed the overall tower height above mean sea level (OHAMSL) as 263 meters. However, Commission records show the OHAMSL as 258.5 meters, which rounds to 259 meters. Since Gelfand proposes to locate on an existing tower, the tower height discrepancy does not effect the acceptability of Gelfand's application. However, Gelfand will be required to submit an amendment correcting the tower height listed on her application to the presiding Administrative Law Judge within 30 days of the release of this Order. Additionally, an air hazard issue will be specified below and the FAA made a party to this proceeding.

6. The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Jamal	April 9, 1990; February 1, 1991; March 4, 1991
Prime	March 20, 1990; October 9, 1990
Cumberland	June 29, 1990
Rita	August 30, 1990

7. Attempts to obtain FAA clearance through the Commission's Antenna Survey Branch and the applicants have been unsuccessful. Accordingly, since no determination has been received as to whether the antenna proposed by Lynn, Bott and Rita would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

8. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by MJR, Prime, MJB and Cumberland would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

9. Data submitted by the applicants indicate there would be a significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

10. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

11. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Gelfand, Jamal, Cumberland and Era in which it is concluded that the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by 47 C.F.R. §§ 1.1301-1319.

2. To determine whether there is a reasonable possibility that the tower heights and locations proposed by Lynn, Bott, Rita, MJR, Gelfand, Prime, MJB and Cumberland would constitute a hazar to air navigation.

3. To determine which of the proposals would, on comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted if any.

12. IT IS FURTHER ORDERED, That, in the event of grant of any of the captioned applications, program test authority may not commence on Channel 294A until FM station WBLG commences program tests on Channel 296C2.

13. IT IS FURTHER ORDERED, That in the event that either MJR or Rita is the successful applicant in this proceeding, the construction permit shall be conditioned as specified in paragraph 3, above.

14. IT IS FURTHER ORDERED, That in accordance with paragraph 4 hereinabove, Gelfand, Jamal, Cumberland and Era shall submit the environmental assessments required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

15. IT IS FURTHER ORDERED, That Gelfand shall submit an amendment in accordance with paragraph 5 hereinabove, to the presiding Law Judge within 30 days of the release of this Order.

16. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Jamal, Prime, Cumberland and Rita ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

17. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

18. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

19. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

20. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Policies and Rules Concerning Children's Television Programming	**MM Docket No. 90-570**
Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations	**MM Docket No. 83-670**

REPORT AND ORDER

Adopted: April 9, 1991; Released: April 12, 1991

By the Commission:

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APPENDIX A: List of Commenters
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APPENDIX D: Final Regulatory Flexibility Analysis Statement

I. INTRODUCTION

1. On November 8, 1990, the Commission adopted a *Notice of Proposed Rule Making*,[1] initiating the process of implementing the Children's Television Act of 1990.[2] The Act (1) requires the Commission to adopt rules limiting the number of minutes that commercial broadcast licensees and cable operators may air during children's programming; (2) requires that the Commission consider in its review of television license renewals, the extent to which the licensee has met the commercial limits, and the extent to which it has served the educational and informational needs of children through its overall programming, including programming specifically designed to serve such needs; and (3) requires the completion, within 180 days of enactment, [3] of a pending proceeding that has sought to define and resolve the treatment of "program length commercials.[4] Based on the record before us, we first prescribe standards for commercial limits in television broadcast and cable programs directed to children 12 years of age and under. Second, we implement the requirement that the Commission review at renewal whether television broadcasters have served the educational and informational needs of children, interpreting the requirement to encompass programming directed to children 16 years of age and under that furthers children's positive development in any way, including serving their cognitive/intellectual or social/emotional needs. Third, we apply essentially the same enforcement standards to violations of the regulations implementing the Act that this Commission has traditionally used to enforce its rules. Fourth, we terminate MM Docket No. 83-670, deciding that a children's program-length commercial is a program, associated with a product, in which commercials for that product are aired. Finally, we adopt an effective date for the children's television rules promulgated here of October 1, 1991, subject to OMB approval. The first television broadcast renewal applications that must demonstrate compliance with these rules are those required to be filed February 1, 1992, for licenses expiring June 1, 1992.[5]

II. COMMERCIAL LIMITS

2. The Children's Television Act provides that television broadcast licensees and cable operators shall limit the duration of advertising in children's programming to "not more than 10.5 minutes per hour on weekends and not more than 12 minutes per hour on weekdays.[6] The Act is silent, however, on the meaning of key terms such as "children," "commercials," or "program."

A. "Children's Programming"

3. The *Notice* proposed to define "children's programming" as "programs originally produced and broadcast primarily for an audience of children 12 years old and under.[7] The vast majority and a broad cross-section of the commenters support this proposal.[8] Various parties note that this formulation is well established,[9] thereby providing certainty, and is consistent with legislative intent, industry practice, and the statutory purpose of protecting children who can neither distinguish commercial from program material nor understand the persuasive intent of commercials.[10] We agree. Some parties urge us to either lower or raise the maximum age.[11] The legislative history of the Act, however, reveals that Congress intended that we use a definition of 12 and under for children's programming.[12] Moreover, there is some empirical evidence with respect to children's comprehension of commercial matter that supports an upper age limit as high as 12 years.[13] We believe, contrary to the views of some,[14] that we have construed the definition of "children's programming" as narrowly as is possible while still effectuating statutory objectives. Finally, we decline to adopt a higher maximum age, as USCC suggests,[15] because such an expansion lacks sufficient support in legislative intent or empirical evidence. We thus define children's programming as "programs originally produced and broadcast for an audience of children 12 years old and under." As the legislative history suggests, and many commenters urge,[16] this definition excludes programs originally produced for a general audience that might nevertheless be significantly viewed by children.[17]

B. "Commercial Matter"

4. The *Notice* proposed to define "commercial matter" in terms of common parlance, *i.e.*, as "air time sold for purposes of selling a product.[18] This definition comports with marketplace realities and is crafted carefully to avoid encompassing noncommercial material. We adopt it, subject to the following clarifications.

5. By requiring that air time be "sold," we mean that the advertiser must give some valuable consideration either directly or indirectly to the broadcaster or cablecaster as an inducement for airing the material.[19] Without such a qualification, it would be difficult to distinguish mentions of logos or brand names a writer or producer used to advance creative objectives. We also clarify that although our proposed definition only referred to air time sold "for purposes of selling a product," commercial matter also encompasses advertising for services.

6. We also find that the scope of Section 317 of the Communications Act, 47 U.S.C. Section 317, which governs when the sponsor of broadcast material must be identified, is not coterminous with the scope of commercial matter. In particular, we hold that material is not necessarily "commercial matter" for purposes of the Children's Televison Act simply because Section 317 requires a sponsorship identification. As the court in *NABB v. FCC* explained, the sponsorship identification requirements apply to more than purely commercial announcements.[20] For example, nonprofit organizations purchasing air time for a public service message must identify themselves as sponsors under Section 317, even though such a message is not commercial material.[21]

7. We accordingly find that the bare sponsorship identification announcement required under Section 317 and our implementing rules,[22] where such material is not otherwise commercial in nature, will not be deemed commercial matter under our definition here. Thus, public service messages sponsored by nonprofit organizations that promote not-for-profit activities will not be considered commercial matter for purposes of applying the commercial limits.[23] Similarly, air time sold for purposes of presenting educational and informational material, including "spot" announcements, with the only sponsorship mention a "sponsored by," is not commercial matter.[24] The addition of product mentions or advertising to such an identification announcement, however, would constitute commercial matter. Moreover, where a station or cable operator promotes one of its upcoming programs and mentions that program's sponsor, even though not required to do so under Section 317, the mention of the sponsor will constitute commercial matter for purposes of determining whether the commercial limits have been exceeded. In such a case, the mention of the sponsor is not required under the rules and is thus clearly intended to promote the sponsor. Thus, if such a station or cable operator's promo (1) mentions that the upcoming program is "brought to you by" a sponsor, or (2) promotes a product or service related to the program or program sponsor, or (3) mentions a prize furnished by the program sponsor, the mention of the sponsor or the sponsor's product or services, not being required under our sponsorship identification rules, will be considered commercial matter.[25] Promotions of upcoming programs which do not contain such sponsor-related mentions will not be deemed commercial matter.

C. "Program"

8. The *Notice* proposed to define "program" as an identifiable unit of program material that is not a commercial or promotional announcement.[26] This definition is well established,[27] consistent with the legislative history, and will provide certainty in implementation.[28] We therefore adopt it. We will also use this definition in assessing a licensee's children's programming record. We clarify that under this definition, a 30- or 60- second noncommercial spot can qualify as educational and informational programming, depending on content.[29]

9. The *Notice* also proposed to "count" commercial minutes by program segment and not by clock hour.[30] Almost all parties commenting on this proposal disagree with it and would make administration of the commercial limits more cumbersome.[31] Upon reflection, we are persuaded that the clock-hour approach would harmonize with existing industry practice and thus make licensee and cable operator administration of the commercial limits easier, while still effectively implementing the statutory limits and shielding children from overcommercialization.[32] We therefore adopt it. Although the Act only applies the commercial limits "per hour," we agree with ACT that where a half-hour "island" of children's programming airs in the midst of adult viewing, the limits should apply on a proportionate basis.[33] As many children's programs are of half-hour duration, this interpretation appears appropriate. We do not believe that application of the limits in this context to programs of shorter duration is necessary, however, as such programs constitute a relatively small proportion of children's programming.[34] We clarify that the limits apply to commercial breaks before and after a children's program, as well as to commercials during a program.[35] As a significant portion of the commercial matter in children's program-

ming occurs at these points, to exclude them would vitiate the statute significantly. Finally, we decline to require counting by both clock hour and program segment.[36] We believe that this would needlessly complicate record-keeping and compliance monitoring.

D. Application to Cable

10. The commercial limits contained in the statute apply to both television broadcast stations and cable operators. Most commenters support proposals in the *Notice* to exempt cable operators from liability for commercial limit violations on broadcast stations they passively carry and on access channels, while holding cable operators liable for compliance with the Act on locally originated channels.[37] The Copyright Act of 1976 bars cable operators from altering the content, including advertising, of retransmitted broadcast programs, and the Children's Television Act makes broadcasters liable for commercial limit violations so that it is unnecessary to make cable operators additionally liable.[38] The Cable Act prohibits cable operators' exercise of editorial control, with limited exceptions, over access channels. On the other hand, under the Cable Act, cable operators maintain editorial control over the content of locally originated channels.[39] We thus hold that cable operators are not responsible for compliance with the commercial limits on the broadcast stations they passively carry or on their access channels. We will, however, apply the commercial limits to cable operators' locally originated channels.

11. Many commenters, including ACT, NCTA and NAB, disagree with the suggestion in the *Notice* that neither the Act nor the legislative history evidence an intent to hold cable operators responsible for commercial limit violations on cable network programs.[40] Upon further consideration, we agree with arguments that the legislative history does in fact suggest that cable operators should be held accountable for cable network violations.[41] Cable networks produce most of the children's programming on cable. If Congress intended for commercial limits to apply to cable, as it clearly did, it could not have intended for the bulk of that programming to be exempt from the proscriptions of the Act. Moreover, although the statute lacks any express provision on this point, it is implicit in the legislation that cable operators are to be held accountable for violations of the commercial limits on cable networks.[42] As NCTA states, without such cable operator liability, there would be an unintended void in the Act's coverage.[43] Finally, the record is devoid of any opposition on the part of the operators themselves to their liability for the cable network programming they carry. We therefore hold that cable operators are liable for violations of the commercial limits on cable network children's programs they carry.

E. Record-keeping and Reporting

12. Most parties agree that certification of compliance with the commercial limits should be required of broadcast licensees at renewal time.[44] We therefore will require that licensees so certify their compliance with our rules and if they cannot so certify, explain all instances in which they have exceeded the commercial limits in children's programs.[45] In light of the statutory directive that the Commission "shall review" television renewal applications for compliance with the limits, we believe that we lack the discretion to rely completely on public monitoring, as INTV suggests.[46] In the absence of such a directive with respect to cable, and in light of the record-keeping requirements we adopt below, however, we believe that reliance on public monitoring is appropriate. It will be relatively easy for members of the public to understand how the commercial limits apply and to perceive violations. Given the certification requirement we are imposing, and the probable efficacy of public monitoring, we decline at this time to institute a regular program of random compliance audits of broadcast stations, as some request.[47]

13. Commenters are divided on whether record-keeping should be required to facilitate review of broadcasters' and cablecasters' compliance with the commercial limits.[48] Given the ease with which programs may be taped, we agree with arguments that public monitoring is likely to have a significant impact in deterring and detecting violations.[49] However, we believe that some record-keeping requirements must be imposed in order to ensure that licensee and cable operator assertions of compliance, as well as allegations of violations, can be verified.[50] As NAB states, broadcasters "undoubtedly will maintain such records for their own commercial purposes and in order to certify their compliance with the rules.[51] We thus do not believe that such a requirement should be overly burdensome, as some suggest.[52] We therefore require television licensees and cable operators to maintain records sufficient to verify compliance with the Act's commercial limits. In the case of broadcast licensees, these records should be sufficient to permit substantiation of the broadcaster's certification of compliance at renewal time. In the case of cable operators, not subject under the Act to renewal review, these records must be retained for a period sufficient to cover the applicable statute of limitations.[53] These records must be made available to the public. Broadcasters and those cable operators subject to a public file requirement must make these records part of their public inspection file.[54]

III. PROGRAMMING RENEWAL REVIEW REQUIREMENTS

14. The Children's Television Act requires that, in reviewing television license renewal applications, we consider whether the licensee has served "the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.[55] We may "in addition" consider (1) "any special nonbroadcast efforts . . . which enhance the educational and informational value of such programming" and (2) any "special effort" to produce or support programming broadcast by another station in the licensee's market that is "specifically designed to serve the educational and informational needs of children.[56] In light of the legislative intent,[57] we will implement this programming provision by reviewing a licensee's renewal application to determine whether, over the course of its license term, it has served the educational and informational needs of children in its overall programming, including programming specifically designed to serve such needs.[58]

A. Age Range of "Children"

15. The Act does not define "children" for purposes of the educational and informational programming renewal review requirement. The *Notice* sought comment on whether we should adopt the same definition of "chil-

dren" that we proposed for the commercial limits, *i.e.*, 12 years of age and under, or whether we should use a broader age range.[59] After reviewing the variety of positions taken in the record, we find that the different policies underlying the Act's programming provision necessitate a broader conception of "children" than we used for commercial limits. While it is primarily younger children who need protection from commercial matter that they do not fully comprehend, older as well as younger children have unique needs and can benefit from programming directed to them.[60] Teenagers are undergoing a transition to adulthood. They are still very influenced by adult role models and peers, including those portrayed on television. They are generally inexperienced and yet face many crucial decisions concerning sex, drugs, and their own identities.[61] To fully comply with the Act's directive that licensees demonstrate responsiveness to the needs of the child audience, we believe that we must interpret the programming renewal review requirement to apply to programs originally produced and broadcast for an audience of children 16 years of age and under.

16. Contrary to the views of some parties,[62] the legislative history and the Act itself support this outcome. For example, the Committee Reports cite several teenage programs as model programming examples.[63] Title II of the Act establishes the National Endowment for Children's Educational Television. That section defines "educational television programming for children" as material "directed to an audience of children who are 16 years of age or younger.[64] It is true the definition of children used in Title II of the Act is not determinative of the definition used for the Title I programming requirement. Nevertheless, it makes sense to interpret the Act so that educational programs entitled to funding under its endowment provisions can qualify as educational and informational programming under the programming renewal review requirements.[65]

17. As we discuss below, we are not requiring that licensees target programming to all ages of children in the under 16 range in order to meet the renewal review requirement. Thus, this expanded age definition should provide the licensee increased flexibility in satisfying the programming renewal review requirement, and dispel fears over increased government control.[66] Finally, although some parties would prefer a definition extending to age 17 and under, [67] this proposal would broaden the age range beyond what is necessary to harmonize the programming provisions with the endowment section of the statute.[68]

18. The *Notice* asked whether the Act requires broadcasters to target particular segments of the child audience.[69] The legislative history, we find, permits but does not require such targeting to satisfy our renewal review. Imposing such a requirement would contravene the legislative intent to afford broadcasters maximum flexibility in determining the "mix" of programming they will present to meet children's special needs.[70] Requiring each broadcaster to serve all age groups in order to pass our renewal review would probably result in less expensive and lower quality programming,[71] possibly engendering what INTV describes as "sameness and mediocrity".[72] We thus decline to adopt suggestions that broadcasters program to all ages or to each subset of children within the under 16 range.[73] Stations may select the age groups they can most effectively serve.

B. Standard

1. Programming

19. Although we stated the desire to avoid any *de facto* system of "precensorship" and to leave it to licensees to interpret the meaning of educational and informational programming, the *Notice* asked those commenters desiring a delineation of the Act's programming renewal review requirement to address what definition of "educational and informational" programming we might use.[74] The *Notice* specifically referred to a description, used by Senator Inouye, as programming which furthers a child's intellectual, emotional and social development.[75] After further reflection, we believe that a general definition of "educational and informational" programming for children would provide needed guidance to the industry as well as to Commission staff administering the statute, and would give licensees sufficient flexibility to exercise their discretion in serving children's needs. We also encourage licensees to use the assessment criteria proposed in the *Notice* in determining how to meet the educational and informational needs of children in their communities.

20. Many parties believe that this Commission should not establish any definition of "educational and informational programming," leaving licensees unfettered discretion to delineate the scope of this requirement.[76] Others, by contrast, would limit licensee discretion by adopting a specific definition limiting "educational and informational programming" to non-fiction,[77] or by establishing independent, expert bodies to define and apply the programming requirement.[78] We do not adopt any of these extremes. Upon reflection, we agree with NABB's suggestion that the Commission cannot properly apply or enforce the Act, and licensees cannot properly implement it, without some delineation of the boundaries of the programming requirement.[79] On the other hand, we agree with CTW and others that limitation of qualifying programming to nonfiction is needlessly constricting, disqualifying even acclaimed programs such as Sesame Street.[80] We do not believe that a child can learn only from nonfiction material. Such a narrow view would contravene the open-minded perspective taken in the legislative history, a perspective consistent with allowing sufficient breadth of discretion for licensee creativity and sensitivity to community needs to develop.[81] For the same reasons we do not adopt the modification of the Commission's formerly used definition of "instructional programming" alternatively proposed in the *Notice*.

21. We believe that a definition based on Senator Inouye's view, described above, or based on McGannon's formulation -- content that serves children's cognitive/intellectual or social/emotional needs -- is closer to the spirit of the Act and to our desire to stimulate, and not dictate, programming responsive to children's needs.[82] Thus, programming that furthers the positive development of the child in any respect, including the child's cognitive/intellectual or emotional/social needs, can contribute to satisfying the licensee's obligation to serve the educational and informational needs of children.

22. The *Notice* proposed to require each licensee to assess the needs of children given (1) the circumstances within the community, (2) other programming on the station, (3) programming aired on other broadcast stations within the community, and (4) other programs for children available in the broadcaster's community of license.

Licensees would then air programs intended to meet "the educational and informational needs of children" responding to this assessment.[83] In order to avoid unnecessary burdens, we are not requiring use of the proposed assessment criteria. We do, however, adopt them as permissive guidelines for exercise of licensee discretion in applying this definition. These factors can serve to make licensees' decisionmaking process more objective and may make it easier for licensees to justify programming decisions that are questioned. We therefore encourage their use. We are concerned with licensee responsiveness to children's needs, not with the precise methodology they use to assess those needs.[84] We thus do not adopt proposals for structured assessment procedures.[85] Licensees will retain reasonable discretion to determine the manner in which they assess the educational and informational needs of children in their communities, provided that they are able to demonstrate the methodology they have used.

23. The assessment factors help licensees decide the type of programming to air. Television broadcasters have no *per se* obligation to monitor other stations or to change their plans based on what another station airs. The assessment factors, however, do not affect the Congressional intent that licensees air some educational and informational programming "specifically designed" for children 16 years of age and under in order to satisfy our renewal review.[86]

24. The Act imposes no quantitative standards and the legislative history suggests that Congress meant that no minimum amount criterion be imposed. Given this strong legislative direction, and the latitude afforded broadcasters in fulfilling the programming requirement, we believe that the amount of "specifically designed" programming necessary to comply with the Act's requirement is likely to vary according to other circumstances, including but not limited to, type of programming aired and other nonbroadcast efforts made by the station. We thus decline to establish any minimum programming requirement for licensees for renewal review independent of that established in the Act.

25. At the request of numerous parties, we clarify that short segment programming, including vignettes and PSAs, may qualify as specifically designed educational and informational programming for children. Such material is well suited to children's short attention spans and can often be locally produced with acceptable production quality.[87] It thus may be a particularly appropriate way for a local broadcaster to respond to specific children's concerns. Whether or not short segment programming fully satisfies the requirement to air programming "specifically designed" to meet children's needs depends on the entire context of the licensee's programming and nonbroadcast efforts directed at children. We also clarify that qualifying programming need not be locally produced and need not be live action, as opposed to animation. We can see no reason in the statute's purpose or legislative history for these restrictions. As the legislative history also indicates, general audience programming can contribute, as part of the licensee's overall programming, to serving children's needs pursuant to the Act. It does not by definition, however, satisfy the additional requirement that licensees air some programming "specifically designed" to serve the educational and informational needs of children.[88]

26. The legislative history provides a wealth of examples of children's programming that is educational and informational. These include "Fat Albert and the Cosby Kids" (dealing with issues important to kids, with interruptions by host reinforcing purpose of show), "CBS Schoolbreak Specials" (original contemporary drama educating children about the conflicts and dilemmas they confront), "Winnie the Pooh and Friends" (show based on books designed to encourage reading), "ABC Afterschool Specials" (everyday problems of youth), "Saved by the Bell" (topical problems and conflicts faced by teens), "Life Goes On" (problems of a retarded child, emphasizing pro-social values), "The Smurfs" (prosocial behavior), "Great Intergalactic Scientific Game Show" (basic scientific concepts), and "Action News for Kids" (weekly news program for and by kids).[89] Where determinations of whether a program qualifies as "educational and informational" are in doubt, we will expect licensees to substantiate their determinations. We will rely on the guidance given in the legislative history, including the specific examples cited above, in ruling on the sufficiency of such demonstrations.

2. Nonbroadcast efforts

27. Section 103(b) of the Act permits the Commission, in evaluating compliance with the broadcaster's obligation to demonstrate at renewal time that it served the educational and informational needs of children, to consider "in addition" to its programming (1) "any special nonbroadcast efforts . . . which enhance the educational and informational value" of programming meeting such needs and (2) any "special effort" to produce or support programming broadcast by another station in the licensee's market that is specifically designed to meet such needs.[90] We now elaborate on certain aspects of these requirements.

28. For nonbroadcast efforts to contribute to satisfying the Act's programming renewal review requirement, they must enhance the "educational and informational value" to children of television programming broadcast either by the licensee or by another station in the community. Thus, however praiseworthy, community outreach efforts unrelated to television programming will not qualify. Similarly, we do not believe that support for children's radio programming, as some urge,[91] although a very laudable objective, qualifies under Section 103(b)(2) as support for another licensee's programming. For support for radio programming to be credited, it must also enhance a related television program under Section 103(b)(1). The "Children's Television Act," as its title indicates, is an attempt to improve television programming for children. For efforts to be credited toward satisfying the Act's programming renewal review requirements, they must somehow enhance or support educational and informational television programming for children.

29. If a station produces or buys children's programs broadcast on another station, so as to qualify under Section 103(b)(2) of the Act, we hold that both stations may rely on such programming in their renewal applications. The extent of support, measured in both time and money, given to another station's programming will determine the weight afforded it. We do not agree with the Public Broadcasting Commenters, however, that such support must consist of the underwriting of an entire program or series to receive some credit.[92] The licensee's obligation to have aired "specifically designed" educational and infor-

mational programming will be satisfied to a degree commensurate with the extent of its nonbroadcast efforts or support for other stations' programming. Nonprogramming efforts, however, will not entirely eliminate the obligation to air some "specifically designed" educational and informational programming.[93] Finally, the provision we have made to give licensees discretion in fulfilling their responsibility under the Act encompasses consideration of financial and technical factors and market size in evaluating compliance, as some suggest.[94]

C. Noncommercial educational stations

30. The *Notice* asked for comment on whether the Act's programming renewal review requirements apply to commercial and noncommercial stations alike, observing that the Act and its legislative history were unclear on this point.[95] Upon further reflection, we find that application of the Act's programming provisions to noncommercial stations is not required by the statute, its legislative history or the public interest. While Section 103(a), requiring review of renewal applications for compliance with the programming requirements, is explicitly directed to " *any* application for renewal of a television broadcast license," Section 102(b), imposing commercial limits, explicitly applies to " *commercial* television broadcast licensee[s].[96] The comparison suggests that the programming provisions apply to a broader category of broadcast stations, including both commercial and noncommercial licensees. When read in context, however, Section 103(a) can only apply to commercial licensees. That section requires review for compliance with two requirements: (1) the commercial limits *and* (2) the educational and informational programming requirement. As the commercial limits do not by definition apply to noncommercial stations, and there is no suggestion that we should apply only part of the two-part test to certain renewals, the implication is that the Act does not apply to noncommercial stations. Moreover, on the whole, the legislative history portrays public broadcasting as a model for educational and informational programming which commercial broadcasters should emulate.[97] This portrayal supports our interpretation of the Act as intended to address the performance of commercial television with regard to the special needs of their child audience.[98] The additional costs of regulation are largely unnecessary for noncommercial stations, and would outweigh any potential benefits from application of the children's programming rules to noncommercial stations. We will not impose such requirements on noncommercial/educational stations.

D. Record-keeping and Reporting

1. Records

31. We find, with the majority of commenting parties, and consistent with legislative intent, that television broadcasters should (1) maintain children's programming records, (2) make these records part of their public inspection file,[99] and (3) retain discretion with regard to the form in which these records are kept.[100] We impose only the requirements necessary for meaningful review. These records should contain a summary of the licensee's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children. The summary should reflect the most significant programming related to such needs that the licensee has aired.[101] Licensees may make their children's programming records (specifically identified as such) part of their issues/programs list or keep them as a separate list and may update them on either a quarterly or annual basis. However, at a minimum, as the legislative history suggests, such records should indicate the time, date, duration and a brief description of the program or non-broadcast effort the licensee has made.[102]

32. Licensees may make general statements regarding the scheduling of short-segment programming such as PSAs and regularly scheduled programs. Licensees need not provide exact times for each and every airing in these cases. Licensees also need not give the exact time of a short-segment program that airs within a longer program. Because we have not adopted a targeting requirement, we do not adopt ACT's suggestion that licensees have a *per se* obligation to record the age groups of children a program serves.[103] As a general matter, licensees need not state the origin of a program.

2. Reporting

33. In light of the apparent intent of Congress, the *Notice* proposed that broadcasters be required to submit their records of children's programming with their license renewal applications. Nevertheless, given the administrative complexity involved in processing each broadcaster's children's programming records, the *Notice* asked whether we might permit certification of compliance with the Act's programming requirement.[104]

34. The parties are divided on this issue. It is true that the language of the statute does not impose an explicit requirement to submit children's programming records at renewal time.[105] In order for the Commission to review a licensee's renewal application in accordance with the manner intended by Congress, however, we must receive sufficient information to determine the extent to which the licensee has responded to the educational and informational needs of children. Moreover, the legislative history strongly suggests that we should review the licensee's children's programming records in evaluating renewal applications.[106] Despite the contrary claims of many broadcasters,[107] a certification of compliance will not provide the Commission with enough information to perform the type of review apparently intended by the Congress.[108]

35. We accordingly will require submission at renewal time of the summary of the licensee's programming response and other efforts directed to the educational and informational needs of children that the licensee is required to maintain in its public file. We will not, however, require submission of supporting records that the licensee may wish to maintain, although those records could later be submitted by the licensee if questions regarding licensee compliance arise. We believe that this resolution will enable a meaningful review of compliance, while minimizing the burden on licensees.

36. We believe that submission of the summary is a more appropriate means of assessing compliance than use of a composite week submission, as some suggest.[109] We do not now use a composite week to evaluate compliance with existing programming obligations. Such a requirement, moreover, would imply that children's programming must be regularly scheduled to satisfy our renewal review, a condition we have not imposed.[110] We also do not adopt proposed processing guidelines based on percentages of children's programming, as these would con-

flict with Congress' rejection of quantitative standards.[111] In light of the submission we are requiring, we do not find it necessary at this time to institute a regular program of random audits, as some parties suggest, although audits are always a possible enforcement mechanism.[112] The statute does not require (or specifically authorize) us to pass upon a licensee's on-going efforts prior to renewal or a licensee's promise of future compliance, and so we decline to require information about proposed programs as TRAC suggests.[113] Finally, the language and purpose of the statute do not warrant extending the filing requirements to applications for transfer and assignment, as TRAC requests, and we decline to do so.[114]

IV. PENALTIES

37. The *Notice* proposed to impose forfeitures on both cable and broadcast operators that exceed the commercial limits in more than a *de minimis* fashion. For continuing or otherwise egregious violations, the *Notice* proposed that television broadcast licensees would lose their renewal expectancy and their license renewal applications would be set for hearing. The *Notice* also sought comment on whether the policy with respect to remedies for failure to meet the educational and informational needs of children should be analogous to those used for commercial limits.[115]

38. There was virtually no controversy in the record over whether the same enforcement standards should apply for commercial limits as for the Act's programming requirements.[116] Most parties also agree with the proposal in the *Notice* to tailor penalties to the magnitude of the violation.[117] The parties disagree, however, on the stringency with which violations should be punished. Broadcast interests generally argue that based on the newness of the rules, and on the breadth of discretion Congress intended licensees to be afforded under them, some element of subjective intent should be present before penalties are assessed.[118] Others believe that in order to ensure compliance, penalties must be substantial.[119]

39. Subject to the exception for *de minimis* violations suggested in the legislative history,[120] we will apply the same enforcement standards that we use in enforcing our other rules to violations of the Act and its implementing rules. This approach will enable us to retain consistent criteria in enforcing all our rules. We accordingly will assess forfeitures for violations of rules implementing the Act if violations are "willful or repeated" within the meaning of 47 U.S.C. Section 503.[121] Given that the Act's programming requirement is to be measured over the course of the license term, however, forfeitures for violation of that requirement would be appropriately considered only at renewal. Similarly, we agree with numerous parties that, consistent with our existing enforcement scheme, violations of the Act should be considered along with a licensee's overall performance in determining whether it is entitled to a renewal.[122] In tailoring penalties to suit the magnitude of the violation, the Commission may impose reporting requirements, forfeitures, short-term renewals, or other sanctions and may take violations into account in determining the weight of a renewal expectancy in a comparative renewal proceeding. We do not believe that the Act empowers us to waive compliance on a long-term, blanket basis either where an "average" number of commercial minutes is within the limits,[123] or for financial hardship or other "unique" circumstances.[124] Finally, we clarify, at the request of numerous parties, that we will include in the category of *de minimis* violations an isolated and inadvertent violation of the commercial limits.[125]

V. PROGRAM-LENGTH CHILDREN'S COMMERCIALS

A. Definition

40. We find that the definition of program-length children's commercial proposed in the *Notice* -- a program associated with a product in which commercials for that product are aired -- strikes the best balance between the important interests involved.[126] This definition protects children from the confusion and deception the intermixture of related program and commercial material may inflict upon them, and still preserves the creative freedom and practical revenue sources that make children's programming possible.[127] For the reasons given below, we adopt this definition.

41. ACT maintains, much as it did in MM Docket No. 83-670,[128] that the Commission should establish a rebuttable presumption that if there is less than a two-year time span between the introduction of a television program and a related product or vice versa, this is *prima facie* evidence that the show is a program-length commercial.[129] We do not find that this is a viable definition. We agree with numerous commenters that it would jeopardize highly acclaimed children's shows such as Sesame Street and Disney programs that have products associated with them.[130] As CTW, the producer of Sesame Street, states, a program's relationship to products is not necessarily indicative of commercial intent. According to CTW, ACT's proposal would inhibit the simultaneous introduction of any new CTW program series and associated products, such as books, magazines, games and computer software whose purpose is to extend the educational benefits of the series. [131] We fear that such a definition would stifle creativity by restricting the sources that writers could draw upon for characters, would limit revenues from merchandising which are an important source of production funding, and would ignore the educational role toys or other related products can play in child development.[132]

42. McGannon would make a *prima facie* finding that a program is primarily a product promotion where related products appear in paid commercial advertising aired on any children's programs broadcast by the same licensee.[133] We believe that if the intent of such a standard is to prevent children from being confused by related program and commercial matter, that standard sweeps far too broadly. It would encompass acclaimed children's programs that, presumably, McGannon would not want to define as program-length commercials.[134] The proposal would also jeopardize the additional revenue streams generated by product merchandising needed by many children's programs.[135]

43. McGannon also believes that the ultimate criteria for determining whether a program is a commercial is whether, given all the circumstances surrounding the creation, production and distribution of a program, including producer's intent, one of the program's primary purposes is to promote products.[136] It specifically disputes the suggestion in the *Notice* that determinations of producer's intent would be difficult if not impossible, and observes that the Commission made such a determination

in the 1969 *Hot Wheels* decision.[137] McGannon is correct that the Commission can use "intent" as a criterion, for example, in determining whether a program is directed to children of a certain age. Determination of whether the creator of a program intended to sell products through a related program is a more difficult endeavor, however. As CTW and Disney suggest, related product marketing is now an integral part of the way children's programs are funded.[138] We would be hard pressed to distinguish among the many children's programs with related product marketing on the basis of whether a producer had commercial or noncommercial intentions in creating the program.[139] The industry practice of related product marketing was not addressed in 1969 in the *Hot Wheels* decision. Since that time we have narrowed the scope of that holding.[140] We believe that the limited precedential value which we have attributed to that decision, in light of prevailing industry practices, remains correct. Moreover, even if McGannon's proposal were administratively feasible, we find that the more precise test proposed in the *Notice* is superior. We are concerned that use of a more vague, facts-and-circumstances test would tend to chill production of children's programming, thereby thwarting the fundamental objectives of the Act.[141]

44. The definition of children's program-length commercial that we are now adopting -- a program associated with a product, in which commercials for that product are aired -- is clear, easy to understand and apply, and narrowly tailored. It directly addresses a fundamental regulatory concern, that children who have difficulty enough distinguishing program content from unrelated commercial matter, not be all the more confused by a show that interweaves program content and commercial matter. Removal of related commercial matter should help alleviate this confusion. Our definition also would cover programs in which a product or service is advertised within the body of the program and not separated from program content as children's commercials are required to be.[142] Contrary to ACT's view,[143] we find that our definition clarifies the manner in which our traditional definition of program-length commercial applies to children's programs.[144] We have previously so held.[145] Given the First Amendment context of this issue, our approach is a restrained one.[146] Should abuses occur, however, we will not hesitate to revisit this issue. We also note that our definition harmonizes with, and codifies to some degree, existing policies with respect to host-selling and adequate separation of commercial from program material in children's programs.[147]

45. In addition, a program will be considered a program-length commercial if a product associated with the program appears in commercial spots not separated from the start or close of the program by at least 60 seconds of unrelated material. It is reasonably likely that a young viewer will tune in immediately before or stay tuned immediately after a program, and that in such circumstances an adjacent spot would have the same effect as if the spot were included in the program itself.[148] We do not find record evidence justifying extending this rule beyond 60 seconds, or further expanding our host-selling policy, as ACT requests.[149] In light of the short attention spans of children, particularly younger children most likely to confuse program and commercial material, we believe that a 60-second separation is adequate.

46. Most parties commenting on the issue agree with the tentative conclusion in the *Notice* that any children's program found to be a program-length commercial would count toward the statutory commercial limits.[150] We agree. This is a logical application of the definition. Although a program- length commercial of a duration under the commercial limits would not by definition violate the limits, it could violate our policy against host-selling or our policy requiring separation of commercial and program material. Because we agree with INTV and NIMA that, in practice, programs of such brief duration are unlikely to be aired,[151] we believe it unnecessary to formulate additional penalties for short-segment program-length commercials.

B. Other Issues

47. Although it had originally requested that the Commission require that sponsorship identification announcements be interspersed throughout "program-length children's commercials" as defined by ACT,[152] ACT now takes the position that such announcements are ineffective.[153] Given the lack of evidence that sponsorship identification announcements can effectively apprise children of the commercial nature of a program in which commercial matter may be interwoven, we will not adopt such a requirement. In addition, in response to an ACT petition concerning interactive toys,[154] the *Notice* sought comment on the impression that interactive toys were not in fact in use. The record substantiates this impression.[155] Further consideration of this issue is thus not warranted at this time.

VI. EFFECTIVE DATE

48. Most broadcast and advertising interests favor a notice period extending to October 1991 or later, before the children's television rules become effective. [156] They argue that this time is necessary to produce educational and informational programming, [157] to re-edit existing programs to comply with the commercial limits [158] and to renegotiate or allow expiration of existing contracts. [159] Some suggest that a Fall, 1991 implementation date is appropriate because Fall is the major period for program adjustment each year. [160] Although the legislative history is not entirely clear on this point, [161] we believe that Congress intended to allow licensees a brief period to adjust to the new rules. [162] We thus adopt an effective date for our rules and policies regarding commercial limits, educational and informational programming renewal review and program-length commercials, of October 1, 1991, subject to OMB approval. This should allow parties a sufficient notice period to permit orderly compliance, while permitting prompt implementation of the Act's provisions.

49. Several parties also urge that the Commission not review broadcast renewal applications for compliance with the children's television rules for a year or more after the rules are effective. [163] We do not believe that such an extensive period of time is necessary for meaningful compliance review. We will begin evaluating compliance with the rules, effective as stated above on October 1, 1991, in renewal applications filed as of February 1, 1992, corresponding with licenses expiring as of June 1, 1992. The period from October 1, 1991 through February 1, 1992, is sufficient for us to begin the compliance review mandated under the Act.

50. Some parties urge us to grant a blanket temporary waiver of the commercial time limits for children's programming acquired on a barter basis prior to completion of this proceeding. [164] INTV argues that in many of these contracts, the station and the program supplier each have the right to sell a portion of the advertising time in the program. INTV believes that application of the commercial limits to such programs will curtail the advertising time available to the station and reduce expected revenues from barter programs. The record, however, does not reflect (1) the number of barter contracts that divide advertising availabilities between the station and program supplier in the manner INTV describes, (2) whether the division of such availabilities between the supplier and the station can be or has been renegotiated as a result of the imposition of commercial limits, (3) the amount of advertising time and associated revenues that stations would lose in the absence of the requested waiver, (4) the number of years that such barter contracts have yet to run, and (5) how the proposed relief would harmonize with the objectives of the statute. We are unwilling at this time and in the absence of such evidence to carve out the temporary exception requested.

ORDERING CLAUSES

51. Accordingly, IT IS ORDERED that pursuant to the authority contained in Sections 4 and 303 of the Communications Act of 1934, 47 U.S.C. Sections 154 and 303, as amended, and the Children's Television Act of 1990, 47 U.S.C. Sections 303a and 303b, Parts 73 and 76 of the Commission Rules, 47 C.F.R. Parts 73 and 76, and FCC Form 303-S, ARE AMENDED as set forth below, effective **October 1, 1991.**

52. IT IS FURTHER ORDERED that MM Docket No. 83-670 IS TERMINATED and the ACT Petitions dated January 17, 1986, February 9, 1987, August 26, 1987, and October 5, 1987 ARE GRANTED TO THE EXTENT INDICATED HEREIN AND OTHERWISE DENIED.

53. Further information on this proceeding may be obtained by contacting Gina Harrison, Mass Media Bureau at (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

FORMAL COMMENTS

Action for Children's Television; American Academy of Child and Adolescent Psychiatry; American Public Health Association; Association for Childhood Education International; Center for Science in the Public Interest; Consumer Federation of America; Consumers Union of U.S., Inc.; National Association for the Education of Young Children; National Association of Elementary School Principals, National Association of Secondary School Principals; National Consumers League; National PTA, and Office of Communication of the United Church of Christ (ACT)

American Academy of Pediatrics (AAP)

American Advertising Federation (AAF)

American Psychological Association (APA)

Association of America's Public Television Stations; Corporation for Public Broadcasting; and the Public Broadcasting Service (Public Broadcasting Commenters)

Association of Independent Television Stations, Inc. (INTV)

Association of National Advertisers, Inc. (ANA)

Cannell Communications, L.P.; Cosmos Broadcasting Corporation; Cox Enterprises, Inc.; Evening Post Publishing Company; First Media Corporation; Guy Gannett Publishing Co.; H&C Communications, Inc.; Midcontinent Television of South Dakota, Inc.; Multimedia, Inc.; Northwest Television, Inc.; River City Television Partners, L.P., Wabash Valley Broadcasting Corporation (Joint Broadcast Parties)

Capital Cities/ABC, Inc. (Capital Cities)

CBS, Inc. (CBS)

Children's Television Workshop (CTW)

Cohn and Marks on Behalf of Clear Channel Television, Inc.; Delmarva Broadcast Service General Partnership; Golden Orange Broadcasting Co., Inc.; Harriscope of Los Angeles, Inc.; Media General Broadcast Group, Inc.; Monitor Television, Inc.; Northeast Kansas Broadcast Service, Inc.; and Sarkes Tarzian, Inc. (Clear Channel)

Corridor Broadcasting Corp. (Corridor)

Curators of the University of Missouri (U of M)

Donald McGannon Communication Research Center (McGannon)

Fisher Broadcasting Inc. (Fisher)

Great American Communications Company (Great American)

HSN Communications, Inc. (HSN)

International Reading Association (IRA)

ITG Channel, Inc. (ITG)

Kelly Broadcasting Company (Kelly)

Mars, Inc. (Mars)

Motion Picture Association of America, Inc. (MPAA)

National Association for Better Broadcasting; National Educational Association of the U.S.; American Association of School Administrators; and National Association for Television and Children (NABB)

National Association of Broadcasters (NAB)

National Broadcasting Company, Inc. (NBC)

National Cable Television Association, Inc. (NCTA)

National Infomercial Marketing Association (NIMA)

Oklahoma City Broadcasting Company, Debtor-in-Possession (Oklahoma City)

Radio-Television News Directors Association; The Media Institute; The Reporters Committee for Freedom of the Press; Society of Professional Journalists (RTNDA)

Station Representatives Association (SRA)

Telecommunications Research and Action Center and Maryland and Virginia Chapters of the Washington Area Citizens' Coalition Interested in Viewers Constitutional Rights (TRAC)

Toy Manufacturers of America, Inc. (Toy Manufacturers)

Trustees of the University of Pennsylvania (U of P)

Turner Broadcasting System, Inc. (TBS)

USA Network (USA Network)

Walt Disney Company (Disney)

Westinghouse Broadcasting Company, Inc. (Group W)

INFORMAL COMMENTS

American Family Association, Inc. (AFA)

Kellogg Company (Kellogg)

Meredith Corporation (Meredith)

National Education Association (NEA)

New York State Education Department (New York)

REPLY COMMENTS

Alaska Broadcasters Association; Illinois Broadcasters Association; Indiana Broadcasters Association; Minnesota Broadcasters Association; Nebraska Broadcasters Association; New Hampshire Association of Broadcasters; New York State Broadcasters Association; Pennsylvania Association of Broadcasters; Wisconsin Broadcasters Association (State Broadcasters)

Capital Cities

CTW

Claster Television, Inc. (Claster)

Cohn and Marks

INTV

Jamie T. Deming

Mc Gannon

MPAA

NABB

NAB

National Broadcast Association for Community Affairs (NBACA)

NBC

NCTA

National Coalition on Television Violence (NCTV)

National Public Radio (NPR)

New York State Broadcasters Association (NYSBA)

Pennsylvania Association of Broadcasters (PAB)

Pickleberry Pie, Inc. (Pickleberry)

SRA

Tribune Broadcasting Company (Tribune)

United States Catholic Conference (USCC)

Disney

INFORMAL REPLY COMMENTS

Association of Advertising Agencies (AAAA)

AFA

Capital Community Broadcasting, Inc. (CCBI)

USA Network

APPENDIX B

1. FCC Form 303-S is amended by adding question 9, to read as follows:

FCC Form 303-S Application for Renewal of License for Commercial and Noncommercial AM, FM or TV Broadcast Station

* * * * *

9. The following sections apply only to commercial television broadcast applicants:

(a) Attach as Exhibit No. _____ a summary of the applicant's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and reflecting the most significant programming related to such needs which the licensee has aired, as described in 47 CFR Section 73.3526(a)(8)(ii).

(b) For the period of time covered Yes No

by this report, has the applicant complied with the limits on commercial matter as set forth in 47 CFR Section 73.660 (no more than 12 minutes of commercial matter per hour or 6 minutes per half hour on weekdays, and no more than 10.5 minutes of commercial matter per hour or 5.25 minutes per half hour during children's programming on weekends)?

(c) If no, submit as Exhibit No. a list of each one hour or 1/2 hour segment of programming designed for children twelve years old and under broadcast during the license period which contained commercial matter in excess of:

(i) 12 minutes per hour or 6 minutes per half-hour on weekdays (Monday through Friday), or

(ii) 10.5 minutes per hour or 5.25 minutes per half hour on weekends (Saturday and Sunday).

For each programming segment so listed, indicate the length of the segment (i.e. one hour or 1/2 hour), the amount of commercial matter contained therein, and an explanation of why the limits were exceeded.

APPENDIX C

Parts 73 and 76 of Title 47 of the Code of Federal Regulations are amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154, 303

2. Section 73.3526 is amended by adding new subparagraphs (a)(8)(ii) and (a)(8)(iii), by redesignating existing paragraph (a)(8) as (a)(8)(i), and by revising the fourth sentence, and adding a new sentence, in paragraph (e). Amended Section 73.3526 will read as follows:

Section 73.3526 Local public inspection file of commercial stations.

(a) * * *

(8) * * *

(ii) For commercial TV broadcast stations, records sufficient to permit substantiation of the station's certification, in its license renewal application, of compliance with the commercial limits on children's programming established in 47 U.S.C. Section 303a and 47 C.F.R. Section 73.660.

(iii) For commercial TV broadcast stations, on either an annual or quarterly basis, records demonstrating the extent to which the licensee responded to the educational and informational needs of children in their overall programming, including programming specifically designed to serve such needs. These records may also reflect any special nonbroadcast efforts by the licensee which enhance the educational and informational value of such programming to children and any special efforts by the licensee to produce or support programming broadcast by another television station in the licensee's marketplace, which is specifically designed to serve the educational and informational needs of children. These records shall include a summary of the licensee's programming response, nonbroadcast efforts and support for other stations' programming directed to the educational and informational needs of children, and shall reflect the most significant programming related to such needs which the licensee has aired. Licensees may make their children's programming records part of their issues/programs list or keep them as a separate list. Such records should indicate, at a minimum, the time, date, duration and a brief description of the program or nonbroadcast effort the licensee has made to serve the educational and informational needs of children.

* * * * *

(e) *Period of Retention.* * * * The "significant treatment of community issues" list and the records demonstrating the station's response to the educational and informational needs of children specified in paragraph (a)(8) of this section shall be retained by commercial broadcast television licensees for the term of license, 5 years. Commercial AM and FM radio licensees shall retain the "significant treatment of community issues list" specified in paragraph (a)(9) of this section for the term of license, 7 years. * * *

* * * * *

3. Section 73.660 is added to read as follows:

Section 73.660 Commercial limits in children's programs

No commercial television broadcast station licensee shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service.

Note 2: For purposes of this section, *children's programming* refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

4. Section 73.661 is added to read as follows:

Section 73.661 Educational and informational programming for children.

(a) Each commercial television broadcast station licensee has an obligation to serve, over the term of its license, the educational and informational needs of children through the licensee's overall programming, including programming specifically designed to serve such needs.

(b) Any special nonbroadcast efforts which enhance the value of children's educational and informational television programming, and any special effort to produce or support educational and informational television programming by another station in the licensee's marketplace, may also contribute to meeting the licensee's obligation to serve, over the term of its license, the educational and informational needs of children.

Note: For purposes of this section, *educational and informational television programming* is any television programming which furthers the positive development of children 16 years of age and under in any respect, including the child's intellectual/cognitive or social/emotional needs.

5. The authority citation for Part 76 continues to read as follows:

Authority: 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, and 309

6. Section 76.225 is added to read as follows:

Section 76.225 Commercial limits in children's programs

(a) No cable operator shall air more than 10.5 minutes of commercial matter per hour during children's programming on weekends, or more than 12 minutes of commercial matter per hour on weekdays.

(b) This rule shall not apply to programs aired on a broadcast television channel which the cable operator passively carries, or to access channels over which the cable operator may not exercise editorial control, pursuant to 47 U.S.C. Section 531(e) and Section 532(c)(2).

(c) Cable operators must maintain records sufficient to verify compliance with this rule and make such records available to the public. Such records must be retained for a period sufficient to cover the limitations period specified in 47 U.S.C. Section 503(b)(6)(B).

Note 1: *Commercial matter* means air time sold for purposes of selling a product or service.

Note 2: For purposes of this section, *children's programming* refers to programs originally produced and broadcast primarily for an audience of children 12 years old and younger.

7. Section 76.305 is amended by revising paragraphs (a) and (c). Amended Section 76.305 will read as follows:

(a) *Records to be maintained.* The operator of every cable television system having 1000 or more subscribers shall maintain for public inspection a file containing a copy of all records which are required to be kept by Section 76.205(d) (origination cablecasts by candidates for public office); Section 76.221(f) (sponsorship identification); Section 76.79 (EEO records available for public inspection); and 76.225 (c) (commercial records for children's programming).

* * * * *

(c) The records specified in paragraph (a) of this section shall be retained for the period specified in Sections 76.205(d), 76.221(f), 76.9 and 76.225 (c).

APPENDIX D

FINAL REGULATORY FLEXIBILITY ANALYSIS STATEMENT

I. **Need and Purpose of this Action:**

54. The actions taken in this decision are intended to satisfy the mandate of the Children's Television Act of 1990. This *Report* and *Order* prescribes standards for commercial limits on children's programs, completes MM Docket No. 83-670, and implements the educational and informational programming renewal review requirements, all as mandated by the Act.

II. **Summary of Issues Raised by the Public Comments in Response to the Initial Regulatory Flexibility Analysis:**

55. No comments were submitted relative to the Initial Regulatory Flexibility Analysis.

III. **Significant Alternatives Considered and Rejected:**

56. The Commission reviewed several definitions of "children" for purposes of monitoring compliance with the commercial limits and the educational and informational programming requirement, but felt that the age ranges selected, 12 and 16 years respectively, offered the strongest protection, within the terms of the Act, to both the interests of children and that of licensees.

57. The Commission had several record-keeping and reporting options available to assist the Agency in monitoring compliance with the provisions of the Act. For example, it could have adopted new restrictive record-keeping burdens on both broadcast licensees and cable operators, or taken a more flexible approach and allowed licensees to choose their record-keeping system. The Commission will require that broadcast licensees at the time of renewal, certify their compliance with the commercial limits and maintain records sufficient to substantiate this certification. Cable operators must maintain records sufficient to verify their compliance with the Act. As the legislative history indicates, broadcast licensees will, however, be required to maintain records demonstrating how they responded to the educational and informational needs of children in their programming. The records must include a summary of licensees' programming response, nonbroadcast efforts and support for other stations' programming, directed to the educational and informational needs of children. This summary must be forwarded to the Commission at renewal time. If a station's compliance with the programming requirement is in doubt, the Commission may also review supporting records. The adopted record-keeping and reporting requirements allow the Commission sufficient information to confirm compliance with the Act's mandate, while limiting the administrative burden on broadcast licensees, cable operators, and the Agency.

58. The Commission in this decision, elects to define, for purposes of implementing the programming renewal review mandated in the Act, "educational and informational" programming as any programming which furthers the positive development of the child in any respect, including, but not limited to, anything which furthers a child's cognitive/intellectual and social/emotional needs. Some of the commenters had asked for a more narrow definition limited, for example, to nonfiction programming. The Commission rejected such a restricted definition because it would disqualify valuable educational or informational matter presented, for example, in a fictional setting or featuring a popular fictional character. In dismissing such a narrow definition, and a second proposal to rely on a third-party review to define and apply the programming requirement, the Commission noted that the legislative history of the Act indicates Congressional intent to afford licensees broad discretion in providing programming responsive to the educational and informational needs of children.

59. Finally, several of the commenters suggest a definition of program-length commercials based on when the program appeared in relationship to when the related products were marketed, based on intent of the producer, or based on whether related product advertisements appeared on television. The Commission adopted a definition of "programs associated with a product, in which commercials for that product are aired." This definition encompasses commercials for a related product within the body of a program and not separated from program matter as children's commercials are required to be. The Commission found that this definition would not jeopardize highly acclaimed shows and would not create implementation difficulties, as would the other alternatives.

60. The Secretary shall send a copy of this *Report and Order*, including the Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981)).

FOOTNOTES

[1] *Notice of Proposed Rule Making*, MM Docket Nos. 90-570 and 83-670, 5 FCC Rcd 7199 (1990) (*Notice*). In response to the *Notice*, 38 parties filed timely comments and 23 filed timely replies. AFA, Kellogg, Meredith, NEA and New York filed initial comments after the January 30, 1991, deadline. AAAA, USA Network, CCBI and AFA filed reply comments after the February 20, 1991, deadline for replies. AAAA also requested that its reply be accepted as a late-filed pleading or, alternatively, be considered as an informal request. We will treat all these late-filed pleadings as informal comments or reply comments, as appropriate. A list of commenting parties and the abbreviations used for them is contained in Appendix A.

[2] Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996-1000, *codified at* 47 U.S.C. Sections 303a, 303b, 394 (Act).

[3] The Act was enacted on October 18, 1990. Thus, the Commission was required to act by April 16, 1991. The rules on commercial limits are also required to be prescribed by this date.

[4] *Revision of Programming and Commercialization Policies, Ascertainment Requirements, and Program Log Requirements for Commercial Television Stations*, MM Docket No. 83-670. The *Notice* consolidated MM Docket No. 83-670 and the instant proceeding.

[5] Several parties have also raised questions regarding the constitutionality of the Act. *See, e.g.*, RTNDA Comments at 3-5; AAAA Reply at 3-11 & Attachment A. We are not obliged to question the constitutionality of an Act of Congress which we are charged with enforcing. *See Meredith Corp. v. FCC*, 809 F. 2d 863, 873 n. 11 (D.C. Cir. 1987). Moreover, Congress, in enacting the statute, has already provided a vigorous defense of its constitutionality. *See, e.g.*, Children's Television Act of 1989, Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 227, 101st Cong., 1st Sess. 10-18 (1989) (Senate Report). We believe it is consistent with legislative intent, however, to interpret the Act with sensitivity to the constitutional rights of the broadcasters and cable operators it affects by affording them significant discretion when implementing the Act. *See, e.g.*, Senate Report at 15-16, 17-18.

[6] 47 U.S.C. Section 303a.

[7] *Notice*, 5 FCC Rcd at 7199, at 7204 n.8.

[8] *See, e.g.*, INTV Comments at 5-8; McGannon Comments at 29-34; NCTA Comments at 3-4.

[9] This age definition was previously used by the Commission in connection with commercial limits on children's programs. *See, e.g., Action for Children's Television*, 53 FCC 2d 161, *modified*, 58 FCC 2d 1169 (1975), *recon. denied*, 63 FCC 2d 26 (1977).

[10] ACT Comments at 7-10 (well established, consistent with industry practice); Capital Cities Comments at 3-4 (providing certainty); CBS Comments at 2-4 (consistent with legislative intent); McGannon Comments at 29 (consistent with goal of protecting children).

[11] Corridor Comments at 7-8 (10 years); NAB Comments at 3-4, AAF Comments at 2-5 (six or at most eight years).

[12] Children's Television Act of 1989, House Committee on Energy and Commerce, H.R. Rep. No. 385, 101st Cong., 1st Sess. 16 (House Report); Senate Report at 22 (referring to definition of 12 years of age and under used in former version of FCC broadcast license renewal form).

[13] *Compare* AAF Comments at 4-5 *with* McGannon Reply at 17-19, NABB Reply at 13 and AFA Comments at 4-5. Although research tends to show that the cognitive ability to discern the persuasive intent of commercials develops in children at the age of seven or eight, studies also indicate, at least by inference, that significant numbers of children, slower than the norm, develop this ability at a later age. Mc Gannon Reply at 18-19; APA Comments in MM Docket No. 83-670 at 6 (filed Feb. 18, 1988)(summarizing experiment in which 30% of 7-8 year olds demonstrated ability to understand commercial intent). We also observe that the statute permits us to review the advertising duration limitations after January 1, 1993, and to modify them after notice and comment and a demonstration of need for such change. 47 U.S.C. Section 303a(c). If after some experience with using an age definition of 12 and under to implement the statute, there appears to be additional evidence that a change in the maximum age would be appropriate, we have the authority to consider such modification after January 1, 1993.

[14] *See, e.g.*, ANA Comments at 3-4.

[15] USCC Reply at 3, 8-9.

[16] *See, e.g.*, NAB Comments at 4; ANA Comments at 5; NCTA Comments at 3-4; Disney Comments at 31. *See* House Report at 16; Senate Report at 22. We similarly agree with the Joint Broadcast Parties that the commercial limits should not apply to programs intended for a teenage audience. Joint Broadcast Parties Comments at 3-4.

[17] We also clarify that if a station with an all-advertising format directs commercials for children's products to adult viewers/purchasers, these commercials would not be considered as aired in connection with "programs originally produced and broadcast for an audience of children 12 years of age and under." *See generally* HSN Comments at 3.

[18] As the *Notice* stated, and many parties agree, this was essentially the definition contained in former FCC Form 303 which was cited in the Act's legislative history. *See Notice*, 5 FCC Rcd at 7199 & n.10. *See, e.g.*, NBC Comments at 5. *See also* Former FCC Form 303, Section III.1.C (Sept. 1981); 47 C.F.R. Section 73.670 nn. 3 & 4 (1976 ed.)(superseded); House Report at 15-16; Senate Report at 21.

[19] We observe that for purposes of determining whether material is "commercial matter," the furnishing of material for airing may or may not qualify as consideration. *See generally Commission Policy Concerning the Noncommercial Nature of Educational Broadcast Stations*, 90 FCC 2d 895, 906 & n.26 (1982) (*Educational Broadcast Stations)*. Some barter arrangements, depending on their terms, may involve consideration furnished as an inducement to air commercial matter. *Cf.* APA Comments at 3. Airing commercials for a local car dealership in exchange for free car rentals would be one hypothetical example. However, not all barter contracts may be so categorized. *Cf. National Association for Better Broadcasting v. Television Station KCOP (TV)*, 4 FCC Rcd 4988 (1989)(*NABB Remand), aff'd sub nom., National Association for Better Broadcasting v. FCC*, 902 F.2d 1009 (D.C. Cir. 1990)(per curiam) (where station gives more than nominal consideration in exchange for a program, sponsorship identification not required for the program).

[20] *National Association for Better Broadcasting v. FCC*, 830 F.2d 270, 275-77 (D.C. Cir. 1987) (*NABB v. FCC), on remand, NABB Remand, supra.*

[21] *See* Letter to Long Island Music Broadcasting Corp. from FCC Mass Media Bureau Enforcement Division (Sept. 28, 1990). We thus do not adopt ACT's suggestion that all matter requiring a sponsorship identification be identified as commercial. ACT also requests that we include in the definition of commercial matter all matter placing undue emphasis on products or promotional material, even if not within the scope of Section 317. ACT Comments at 4, 25-28. We believe ACT's proposal is too vague to serve as a viable definition. Accordingly, unless the circumstances show that such material placing undue emphasis on products or promotional material fits our definition of commercial matter, such material will not be deemed commercial. *See generally KISD, Inc.*, 22 FCC 2d 833 (1970) ("plugs" as commercial matter).

[22] 47 C.F.R. Sections 73.1212, 76.221.

[23] INTV Comments at 13 & n.23; *Educational Broadcast Stations, supra*, 90 FCC 2d at 906.

[24] *See generally* Disney Comments at 26-29; Disney Reply at 15-16. *Cf. Educational Broadcast Stations, supra*, 90 FCC 2d at 911 (donor acknowledgement, required under 47 C.F.R. Section 73.1212, as well as donor's logogram, is permitted on noncommercial stations, pursuant to public broadcaster's good faith determination that such acknowledgement identifies, rather than promotes, donor). Indeed, we wish to encourage the

sponsorship of educational and informational material, and believe that short-segment programming of this nature may be particularly effective in reaching a child audience. *See* discussion *infra* para. 25.

[25] Of course, some consideration must be furnished for the airing of the material. Moreover, even if no separate consideration is received for such mentions, if such "hybrid" promotional/commercial spots are part of a program package for which the broadcaster or cablecaster receives consideration, then consideration was received for the airing of these announcements. This approach is consistent with our previous decisions under which "bonus" spots or ostensibly free spots broadcast in connection with an agreement to run paid spots were treated as commercial matter. Former FCC Form 303, Section III.1.C, *cited in* Senate Report at 21, House Report at 15-16.

[26] *Notice*, 5 FCC Rcd at 7199.

[27] *See, e.g.*, Former FCC Form 303, Section IV-B, II.3 (Dec. 1973) (defining "program" as "identifiable unit of program material . . . which is not an announcement").

[28] Capital Cities Comments at 3-4.

[29] *See infra* para. 25.

[30] *Notice*, 5 FCC Rcd at 7199, at 7205 n.12. Both methods apply the limits to programming on an hourly basis, but they begin "counting" at different points. Counting by the clock hour begins at the start of the hour and finishes at the hour's end, and not at the start of a program segment (which might, for example, begin at the half-hour).

[31] *See, e.g.*, SRA Comments at 2-3; ACT Comments at 29-30; Clear Channel Comments at 41-43.

[32] ACT Comments at 30 & n. 83; NAB Comments at 5.

[33] *See generally* ACT Comments at 30. Thus, a weekend half-hour children's program would be limited to 5.25 minutes of commercials, and a weekday half-hour program to 6 minutes. *See* Amendments to FCC Form 303-S, Appendix B, *infra*. We also agree with NIMA that no limits should apply to an adult program aired as an "island" within a block of children's programming. NIMA Comments at 3-4; Clear Channel Comments at 43 n.48.

[34] *See generally* Clear Channel Comments at 41-43 & n.47.

[35] In the general case, we will measure commercial time associated with a program beginning at the hour or half hour as appropriate, and ending on the hour or half hour, depending on the program's duration. For programs not conforming to the standard hour or half-hour time periods or otherwise not involving clear starting and ending periods, we would follow Clear Channel's suggestion and allocate half of the break at the beginning or end of a program to the immediately proceeding program and half to the next program. Clear Channel Comments at 42-44 & n.47.

[36] NABB Reply at 15.

[37] *Notice*, 5 FCC Rcd at 7199-7200. *See, e.g.*, NCTA Comments at 4-5.

[38] 17 U.S.C. Section 111(c)(3); 47 U.S.C. Section 303a(b); NCTA Comments at 4-9; NABB Comments at 5-8.

[39] 47 U.S.C. Section 531, 532(c)(2).

[40] 5 FCC Rcd at 7200. *See, e.g.*, ACT Comments at 33-34; NCTA Comments at 6-7; NAB Comments at 5.

[41] *See, e.g.*, ACT Comments at 33-34; TBS Comments at 5. *See* Senate Report at 10 (referring to advertising on cable network programs). While not unambiguous, the Act's definition of "commercial television broadcast licensee" as including "cable operators" itself suggests that Congress intended cable operators to be responsible for compliance with the commercial limits on cable network programs.

[42] Cable programmers state that the Act does not confer the authority to hold them directly responsible for advertising limit violations. They state, however, that they intend to comply with these limits and several made similar representations to Congress. *See, e.g.*, USA Network Comments at 1; Cable Hearing, at 12, 14 (testimony of Geraldine B. Laybourne, president and general manager, Nickelodeon), at 15-16 (testimony of John S. Hendricks, chairman and chief executive officer, Cable Educational Network, Inc., the Discovery Channel).

[43] NCTA Comments at 7.

[44] *See, e.g.*, Tribune Reply at 3.

[45] *See* Appendix B *infra*.

[46] 47 U.S.C. Section 303b(a); INTV Comments at 22.

[47] *See, e.g.*, ACT Comments at 29, 31-32.

[48] *Notice*, 5 FCC Rcd at 7200. *Compare* NAB Comments at 7 (record-keeping unnecessary) *with* ACT Comments at 29, 31, 34 (record-keeping should be required).

[49] *See, e.g.*, NBC Comments at 30.

[50] *See, e.g.*, NABB Reply at 12 n.12.

[51] NAB Comments at 7.

[52] NCTA Reply at 5-8. We observe that cable operators may wish to arrange to have cable networks provide to them commercial records for the children's programming cable networks supply.

[53] 47 U.S.C. Section 503 (b)(6)(B).

[54] 47 C.F.R. Sections 73.3526, 76.305. Cable operators of systems with under 1,000 subscribers are not subject to public file requirements. They must, however, retain commercial records for children's programming and make them available to the public.

[55] 47 U.S.C. Section 303b(a)(2).

[56] 47 U.S.C. Section 303b(b)(2).

[57] *See* House Report at 17; Senate Report at 16-17, 23.

[58] We expect substantial compliance throughout all of the broadcaster's license term. In situations in which the Act was in effect for less than a broadcaster's full license term, we will examine a licensee's compliance during the period of its term that the rule was in effect.

[59] 5 FCC Rcd at 7200.

[60] *See generally* AAP Comments at 5 (teenagers just as impressionable and exploitable as younger children).

[61] *See generally* Meredith Comments at 2-4.

[62] *See, e.g.*, ACT Comments at 10-12; McGannon Reply at 15.

[63] Senate Report at 8.

[64] 47 U.S.C. Section 394 (i)(1).

[65] ACT is correct that prior to passage of the Act, the Commission had traditionally defined children, for purposes of determining whether their special programming needs are met, as 12 and under. ACT Comments at 7-9. With the passage of the Act, and in light of its legislative history, we believe that we need to revise this definition.

[66] *See generally* INTV Comments at 29-30.

[67] *See, e.g.*, HSN Comments at 11-13.

[68] We believe that a definition of "children" as persons 16 and under is most consistent with Congressional intent in enacting the Children's Television Act. By contrast, we have defined "children" as persons 17 and under when enforcing the statutory prohibition against broadcast indecency (Section 1464 of

Title 18 of the United States Criminal Code) because both the federal and the state legislatures have evinced concern over exposing children 17 and under to sexually explicit materials. *See Report of the Commission, Enforcement of Prohibitions Against Broadcast Indecency in 18 U. S. C. Section 1464*, 5 FCC Rcd 5297, 5301 (1990).

[69] *Notice*, 5 FCC Rcd at 7200.

[70] Senate Report at 17, 23; House Report at 12, 17. As Kelly observes, a predecessor bill to the Act expressly required programming for pre-school and school-aged children and was amended to permit a more general programming obligation. Kelly Comments at 9 n. 6. *See* S. 1215, 101st Cong. 1st Sess, Section 3(b)(2) (1989). We thus disagree with ACT that Congress intended to require age-specific programming. ACT Comments at 23-25.

[71] NAB Comments at 9-10.

[72] INTV Reply at 11.

[73] *See, e.g.*, NABB Comments at 16-17; AAP Comments at 5.

[74] 5 FCC Rcd at 7200.

[75] *Notice*, 5 FCC Rcd at 7206 n.30 (citing 136 Cong. Rec. S10122 (daily ed. July 19, 1990)(remarks of Senator Inouye)).

[76] *See, e.g.*, RTNDA Comments at 11; NAB Comments at 12.

[77] *See, e.g.*, ACT Comments at 2-3, 20-23.

[78] NABB Comments at 19-20.

[79] NABB Reply at 6.

[80] CTW Reply at 2-5.

[81] Senate Report at 17, 23; House Report at 12, 17. We also do not adopt AFA's suggestion that we mandate that general audience programs not be harmful to child viewers or NCTV's proposal for a specific definition of educational and informational programming that would include, *inter alia*, programming stressing non-violence and strong family and social bonding. AFA Comments at 15-19; NCTV Reply at 1. We find these proposals beyond the intent and purpose of the statute.

In addition, we are not persuaded that we should require licensees to air "regularly scheduled" educational and informational programming, as Claster requests. Claster Reply at 2-3. Some licensees may, for example, believe that the needs of children in their community may best be met by children's program specials devoted, perhaps, to particular topical issues. We will not foreclose such a possibility.

[82] *See* 136 Cong. Rec. S10122 (daily ed. July 19, 1990)(remarks of Senator Inouye); McGannon Reply at 11. *See generally* NBC Comments at 17-18 (in the event Commission opts to define "educational and informational programming," legislative history, including Senator Inouye's statement, indicates requirement intended to encompass broadly the development of the whole child, including both cognitive and affective needs).

[83] 5 FCC Rcd at 7200.

[84] *See generally* U of M Comments at 4-5; HSN Comments at 17-18.

[85] NEA Comments at 4.

[86] 47 U.S.C. Section 303b(a); Senate Report at 23; House Report at 17.

[87] To the extent that existing children's programs are formatted with gaps to be filled by commercials which exceed the commercial time limits, such short-segment educational and informational programming might provide a practical way to use this time beneficially.

[88] Senate Report at 23; House Report at 17.

[89] Senate Report at 7-8.

[90] 47 U.S.C. Section 303b(b).

[91] U of P Comments at 2, 8-10; NPR Reply at 5-6; Pickleberry Reply at 1-2, 7-8; CCBI Reply at 1-3; Deming Reply at 1-3.

[92] Public Broadcasting Comments at 16-22.

[93] *See supra* para. 23.

[94] Cohn and Marks Comments at 21-29.

[95] 5 FCC Rcd at 7205 n.19. 47 C.F.R. Section 73.621 provides that, with some exceptions, noncommercial educational stations "will be licensed only to nonprofit educational organizations upon a showing that the proposed stations will be used primarily to serve the educational needs of the community; for the advancement of educational programs, and to furnish a nonprofit and noncommercial television broadcast service."

[96] *Compare* 47 U.S.C. Section 303a(b) *with* Section 47 U.S.C. Section 303b(a)(emphases supplied).

[97] For example, the Senate Report cites public broadcasting programs, "Mister Roger's Neighborhood," "Sesame Street,""Electric Company," "3-2-1 CONTACT, "Square One TV," and "Reading Rainbow" as programs that are effective in teaching children specific skills. It then concludes that "[t]oday, public television is the primary source of educational children's programming in the United States, broadcasting over 1,200 hours of children's educational programming for home viewing." The Senate Report adds, "[h]owever, our children watch more than just public television . . . [W]hen viewed as a whole, there is disturbingly little educational or informational programming on commercial television." Senate Report at 6-7. *See also* 136 Cong. Rec. S10123 (remarks of Sen. Wirth) (July 19, 1990 daily ed.) ("[E]ducational programs have literally disappeared from the airwaves on all but PBS stations"); 136 Cong. Rec. S16342 ("No longer will [educational children's programming] be limited solely to PBS")(remarks of Sen. Wirth)(Oct. 22, 1990 daily ed.). *Cf.* Senate Report at 22 ("Those who think that H.R. 1677 will foster real improvements in commercial TV programming are sadly mistaken") (dissenting views).

[98] Senate Report at 6-7. We also observe, as the Public Broadcasting Commenters state, that the Corporation for Public Broadcasting, one of the major funding sources for public broadcasting, has a statutorily mandated goal of service to children's needs. *See* Public Broadcasting Comments at 4-8; 47 U.S.C. Section 396 (a)(6).

[99] *Notice*, 5 FCC Rcd at 7200. *See, e.g.*, Tribune Reply at 6; AAP Comments at 4.

[100] *See, e.g.*, NAB Comments at 12; AAP Comments at 4.

[101] "Children's programming records" refers to all the records licensees must keep to demonstrate their response to the educational and informational needs of children, even though these records may also document non-programming responses to such needs. Moreover, we note that, although they are not required to do so, licensees may wish also to retain records supporting their children's programming summaries that would help demonstrate the extent of their responses to the educational and informational needs of children if challenged on this issue at renewal.

[102] Senate Report at 23; House Report at 17-18.

[103] ACT Comments at 14-15.

[104] 5 FCC Rcd at 7201.

[105] *See, e.g.*, Clear Channel Comments at 39-41.

[106] House Report at 18; Senate Report at 24 ("Broadcasters . . . must send the children's television lists contained in the public files to the FCC at the time the FCC is considering their licenses of renewal [sic]. The Committee recognizes that this last

requirement distinguishes this material from all other community issue-oriented programming. That is the committee's explicit intent.")

[107] *See, e.g.*, NAB Comments at 12-13; NBC Comments at 32-33.

[108] *See generally* NABB Comments at 29. In certifying compliance with the commercial limits, a licensee is responding to a question of fact -- whether it has limited its commercial time in children's programs to a measurable number of minutes, as prescribed by statute. The Act, however, does not set measurable standards for programming review at renewal time. Rather, it suggests that we should take a more individualized approach to each renewal application, looking at "the extent" to which the broadcaster has met children's educational and informational needs through its "overall programming," including programming specifically designed to serve such needs, and taking into account special nonbroadcast efforts and support for other stations' programming. Certification would not permit us to perform a review of this nature.

[109] ACT Comments at 3, 15-17.

[110] *See supra* note 81.

[111] ACT Comments at 17-20. *See* House Report at 17; Senate Report at 23.

[112] *See, e.g.*, Joint Broadcast Parties Comments at 24 n.22 (alternative proposal).

[113] TRAC Comments at 6-7.

[114] TRAC Comments at 7.

[115] 5 FCC Rcd at 7200-01.

[116] Three commenters argue for different standards. *See* NYSBA Reply at 12-14; PAB Reply at 12-14; State Broadcasters Reply at 12-14.

[117] *See, e.g.*, CBS Comments at 5 n. 1; NBC Comments at 33-34; AAP Comments at 4-5.

[118] *See, e.g.*, Westinghouse Comments at 4-5; NAB Comments at 6.

[119] NABB Comments at 10; CTW Comments at 9.

[120] *See, e.g.*, House Report at 16.

[121] *See MCI Telecommunications Corp.*, 3 FCC Rcd 509, 515-16 n.22, *supplemented*, 3 FCC Rcd 3155, 4 FCC Rcd 7299 (1988), *appeal dismissed sub nom. Telestar, Inc. v. FCC*, 901 F.2d 1131 (D.C. Cir. 1990)(Table)(carrier's actions were "willful" in that it took the action involved and "repeated" in that they were repeated over more than one day). This traditional, statutory standard does not require the level of intent several parties argue should be present before penalties are assessed for Children's Television Act violations. *See, e.g.*, NAB Comments at 6.

[122] *See, e.g.*, Westinghouse Comments at 5. *See generally Office of Communication of United Church*, 779 F. 2d 702, 708-9 (D.C. Cir. 1985) (renewal applicant's "overall" programming efforts must adequately treat issues of public concern).

[123] Corridor Comments at 8. *See also* NBC Comments at 8. NBC states that under the 10.5 minute weekend commercial limit, half-hour Saturday morning children's programs are likely to be formatted with 5 and 5.5 minutes of commercial matter, with the programs containing the 5 and 5.5 minutes of commercial matter running back to back. It expresses concern that in the event of a scheduling adjustment, two programs with 5.5 commercial minutes and two programs with 5 commercial minutes would be placed back-to-back, exceeding the commercial limits in one hour, but leaving the "average" in that weekend block of time within the limits. Although we do not permit "averaging" on a blanket basis, to the extent that NBC is concerned about an occasional emergency scheduling change, we would take this factor into account in deciding whether to allow for extenuating circumstances.

[124] Clear Channel Comments at 29-34. *See Cablevision VI, Inc.*, 68 RR 2d 575 (1990). Ability to pay is, of course, a relevant consideration in assessing the amount of a forfeiture, as opposed to determining whether a violation exists in the first instance. *See* 47 U.S.C. Section 503 (b)(2)(D).

[125] *See, e.g.*, INTV Comments at 19-20.

[126] *Notice*, 5 FCC Rcd at 7201.

[127] In light of the Act's imposition of commercial limits on both television broadcasters and cable operators, we will apply our definition of program- length children's commercials to both television broadcast and cable programs for children.

[128] The Act requires that we complete MM Docket No. 83-670, which raises the program-length children's commercial issue. A predecessor bill would have categorized certain product-related programs as commercial matter, but was deleted in a compromise amendment. *See* 136 Cong. Rec. S10124 (daily ed. July 19, 1990)(remarks of Senator Wirth). The Act therefore affords us no specific guidance on how to decide the questions relating to program-length children's commercials. *See generally* Senate Report at 22 ("The Committee has not dealt with [the program-length commercial] controversy except to require the FCC to complete . [Mass Media Docket No.] 83-670 . . . . The Committee does not intend to affect the regulation of the controversy by enactment of this legislation.")

[129] ACT Comments at 45.

[130] *See, e.g.*, HSN Comments at 26 & n. 23; Cohn and Marks Reply at 26-27.

[131] CTW Reply at 11.

[132] Disney Comments at 18-24; MPAA Reply at 4-6.

[133] McGannon Comments at 22-24. *Cf.* NABB Comments at 33-34, iv (whether related products are advertised on television should be factor in determining whether show is program-length children's commercial).

[134] *Cf.* Disney Comments at 24 (if, *inter alia*, manufacturers were not permitted to advertise their products during other shows, it could become economically imprudent for Disney to continue producing children's series for first-run syndication).

[135] Disney Comments at 21-24. CTW also asks us to ban all program-length child-directed promotions containing no separate advertising spots. CTW Comments at 20-23. This request, however, begs the basic dilemma: how to distinguish a program from a promotion.

[136] McGannon Comments at 17-18.

[137] *Topper Corp.*, 21 FCC 2d 148 (1969). *See also American Broadcasting Companies, Inc.*, 23 FCC 2d 132 (1970); *American Broadcasting Companies, Inc.*, 23 FCC 2d 134 (1970).

[138] CTW Comments at 4; Disney Comments at 10-12, 15-16.

[139] *See generally* Capital Cities Reply at 13-14 (commercial motives are not necessarily inconsistent with good programming for children).

[140] *ACT v. KTTV*, 58 RR 2d 61, 67 n. 18 (1985), *rev'd on other grounds, NABB v. FCC, supra*.

[141] *Cf.* Disney Comments at 25-26 (test based on producer's intent would be impermissibly vague and would tend to chill the creative process).

[142] *See Weigel Broadcasting Company*, 41 FCC 2d 370 (1973) (eight-minute segment inviting viewers to contact sponsor about entering chinchilla ranching business in half-hour program on

chincilla ranching); MPAA Comments at 4 n.5 (clever marketer cloaking commercial message in, for example, a news report in body of program).

[143] ACT Comments at 45-46.

[144] For our traditional definition, *see Applicability of Commission Policies on Program-Length Commercials,* 44 FCC 2d 985, 986 (1974)(a program segment "so interwoven with, and in essence auxiliary to the sponsor's advertising . . . that the entire program constitutes a single commercial promotion for the sponsor's products or services").

[145] *ACT v. KTTV, supra,* 58 RR 2d at 66 (applying traditional definition by reviewing program for the airing of related commercials).

[146] *Federal Communications Commission v. League of Women Voters,* 468 U.S. 364, 380 (1984).

[147] Our policy against "host-selling" prohibits the use of program talent to deliver commercials. *Action for Children's Television,* 50 FCC 2d 1, 8, 16-17 (1974). The policy applies to endorsements or selling by animated cartoon characters as well as "live" program hosts. Letter to KCOP Television from FCC Mass Media Bureau, Enforcement Division (May 15, 1989) (*May 15 Letter*). "Host-selling" is a special application of our more general policy with respect to separation of commercial and program material. The separation policy is an attempt to aid children in distinguishing advertising from program material. It requires that broadcasters separate the two types of content by use of special measures such as "bumpers" (*e.g.,* "And now it's time for a commercial break," "And now back to the [title of the program]"). *Action for Children's Television,* 50 FCC 2d at 14-16. Bringing program elements into the commercial breaks within a program, for example, undermines the effectiveness of this policy. *May 15 Letter.* In general, a first-time violation of a Commission policy such as host-selling or separation of program and commercial material will result in a letter of admonishment. Violations of our rules regarding program-length children's commercials may be subject to forfeitures.

[148] *See generally* MPAA Reply at 7.

[149] ACT Comments at 47-50.

[150] *Notice,* 5 FCC Rcd at 7201. *See, e.g.,* NIMA Comments at 4; AAP Comments at 2.

[151] INTV Comments at 51-52; NIMA Comments at 4.

[152] ACT Petition (filed Jan. 17, 1986); ACT Petition for Declaratory Ruling or Notice of Inquiry at 1, 5-6 (filed Feb. 9, 1987) (*ACT Interactive Toy Petition*).

[153] ACT Comments at 27 n.78. *See also* AAP Comments at 4; NIMA Comments at 4.

[154] *ACT Interactive Toy Petition.*

[155] *See, e.g.,* Toy Manufacturers Comments at 6-7; AAAA Reply at 17; Tribune Reply at 8-9.

[156] *See, e.g.,* AAAA Reply at 16 (proposing October 1, 1991); INTV Comments at 24-26, 49-50 (proposing January 1, 1992).

[157] NBC Comments at 34; CBS Comments at 15.

[158] CBS Comments at 15-16.

[159] NAB Comments at 14; INTV Comments at 24-26.

[160] *See, e.g.,* CBS Comments at 15.

[161] An April 1989 predecessor version of H.R. 1677, the bill ultimately enacted into law, specifically provided that the commercial limits were to be effective January 1, 1990 (eight months later) and the House Report on the bill, issued that November echoed that same January 1, 1990 effective date (two months later). H.R. 1677, 101st Cong. 1st Sess. (1989). The House Report, issued in November, 1989, contemplates a January, 1990 effective date for the commercial limits. House Report at 16. On the other hand, the Senate Report states that it expects licensees to be in compliance with the programming standard set forth in the legislation within one year of enactment. Senate Report at 24. In July of 1990, three months before the bill's passage, Senator Inouye, one of the members of the House committee reporting the bill, stated that "[t]he committee expects licensees to be in compliance with the commercial time limits and the programming standard set forth in Title I by September 1991." 136 Cong. Rec. S10122 (daily ed. July 19, 1990).

[162] We do not agree with NABB that Congress intended a Spring 1991 effective date. Allowing for the 180 days to complete this Rule Making afforded by the statute, and the time needed to obtain Office of Management and Budget approval for the filing obligations the statute necessitates, a Spring 1991 effective date would not be possible. 5 C.F.R. Section 1320.14(c).

[163] *See, e.g.,* Joint Broadcast Parties Comments at 26; INTV Comments at 49, 50.

[164] INTV Comments at 26-28; NAB Comments at 14 n.18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-596

In the Matter of

Amendment of Section 73.202(b), RM-7454
Table of Allotments,
FM Broadcast Stations.
(Dayton, Washington)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 28, 1991; Released: April 18, 1991

By the Acting Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 7391 (1990), issued in response to a petition filed by Peanut Whistle Broadcasting (petitioner) proposing the substitution of FM Channel 223C1 for 223A at Dayton, Washington, and the modification of its construction permit for Station KZHR at Dayton to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 223C1 for Channel 223A at Dayton, Washington, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified in petitioner's construction permit for Station KZHR.[1] Concurrence of the Canadian government has been obtained, since Dayton is located within the 320 kilometers (200 miles) of the U.S.-Canadian border. In accordance with Section 1.420(g) of the Commission's Rules, we will also modify petitioner's construction permit for Station KZHR at Dayton to specify operation on Channel 223C1.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dayton, Washington	223C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Peanut Whistle Broadcasting for Station KZHR, Dayton, Washington, IS MODIFIED to specify operation on Channel 223C1 in lieu of Channel 223A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 223C1 at Dayton are North Latitude 46-19-14 and West Longitude 117-58-46.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-108

In the Matter of

Amendment of Section 73.202(b), RM-7690
Table of Allotments,
FM Broadcast Stations.
(Superior, Nebraska)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 29, 1991; Released: April 18, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Superior Broadcasting Incorporated ("petitioner"), requesting the substitution of Channel 280C3 for Channel 280A at Superior, Nebraska, and the modification of Station KRFS-FM's license to specify operation on the higher powered channel. Petitioner failed to state its intention to apply for Channel 280C3, if allotted to Superior. It is therefore requested to do so in comments.

2. We believe the public interest would be served by proposing the substitution of Channel 280C3 for Channel 280A at Superior, Nebraska, since it could provide the community with a wide coverage area FM service, thus enabling Station KRFS-FM to expand its service area. Channel 280C3 can be allotted to Superior in compliance with the Commission's minimum distance separation requirements and can be used at Station KRFS-FM's presently licensed transmitter site. [1] As requested, we also propose to modify petitioner's license for Station KRFS-FM to specify operation on Channel 280C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 280C3 at Superior or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Superior, Nebraska	280A	280C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **June 10, 1991**, and reply comments on or before **June 25, 1991**, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Tom W. Davidson, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 280C3 at Superior are North Latitude 40-01-30 and West Longitude 98-04-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-581

In the Matter of

Amendment of Section 73.202(b), RM-7521
Table of Allotments,
FM Broadcast Stations.
(Volga, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1991; Released: April 18, 1991

By the Chief, Allocations Branch:

1. At the request of CD Broadcasting Corporation of Brookings ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 7024 (1990), proposing the substitution of Channel 272C3 for Channel 272A at Volga, South Dakota, and the modification of Station KKQQ-FM's license to specify operation on the higher powered channel. Petitioner submitted comments reiterating its intention to apply for Channel 272C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 272C3 for Channel 272A at Volga, South Dakota, because it could provide the community with a wide coverage area FM service, thus enabling Station KKQQ-FM to expand its service area. Channel 272C3 can be allotted to Volga in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) south to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's license for Station KKQQ-FM to specify operation on Channel 272C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Volga, South Dakota	272C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of CD Broadcasting Corporation of Brookings for Station KKQQ-FM, Volga, South Dakota, IS MODIFIED to specify operation on Channel 272C3, in lieu of Channel 272A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 272C3 at Volga are North Latitude 44-15-21 and West Longitude 96-57-22.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-543

In the Matter of

Amendment of Section 73.202(b), RM-7530
Table of Allotments,
FM Broadcast Stations.
(Ripley, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 29, 1991; Released: April 18, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 6703 (1990), issued in response to a petition filed by James P. Gray ("petitioner"), proposing the substitution of FM Channel 258C3 for Channel 258A at Ripley, Ohio, and the modification of his construction permit for Station WXKD to specify operation on the higher powered channel. Petitioner filed comments in support of the proposal reaffirming his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 258C3 for Channel 258A at Ripley, Ohio, since it could provide the community with a wide coverage area FM station. The substitution can be made in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) southwest of the community to avoid a short-spacing to Station WNXT-FM, Channel 257A, Portsmouth, Ohio, and to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's construction permit for Station WXKD to specify operation on Channel 258C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ripley, Ohio	258C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of James P. Gray for Station WXKD, IS MODIFIED to specify operation on Channel 258C3, in lieu of Channel 258A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 258C3 at Ripley are North Latitude 38-37-30 and West Longitude 84-01-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-231

In the Matter of

Amendment of Section 73.202(b),	RM-7294
Table of Allotments,	RM-7418
FM Broadcast Stations.	
(Bismarck, North Dakota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 3, 1991; **Released: April 18, 1991**

By the Chief, Allocations Branch:

1. At the request of J B Broadcasting ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 2809 (1990), proposing the allotment of Channel 268A to Bismarck, North Dakota, as the community's fifth local FM service. Petitioner filed a counterproposal requesting the allotment of Channel 268C in lieu of Channel 268A to Bismarck and stated its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 268C to Bismarck, North Dakota, since an interest has been expressed in providing the community with an additional local FM service. Channel 268C can be allotted to Bismarck in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence has been received since Bismarck is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Petitioner's proposal to allot Channel 265A to Bismarck will, therefore, be denied.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991**, the FM Table of\Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Bismarck, North Dakota	225C, 233C, 243C, 254C, 268C

4. The window period for filing applications will open on **June 4, 1991**, and close on **July 5, 1991**.

5. IT IS FURTHER ORDERED, That the petition of JB Broadcasting (RM-7294) to allot Channel 268A to Bismarck, North Dakota, IS DENIED.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the counterproposal was given on July 2, 1990, Report No. 1820.

[2] The coordinates for Channel 268C at Bismarck are North Latitude 46-48-24 and North Latitude 100-46-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-220

In the Matter of

Amendment of Section 73.202(b), RM-7231
Table of Allotments,
FM Broadcast Stations.
(Hobbs, New Mexico)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 3, 1991; Released: April 18, 1991

By the Chief, Allocations Branch:

1. At the request of Oil Patch Broadcast Partnership ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 2727 (1990), proposing the allotment of Channel 243A to Hobbs, New Mexico, as the community's fourth local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted.[1] No other comments were received.

2. We believe the public interest would be served by allotting Channel 243A to Hobbs since it could provide the community with an additional local FM service. Channel 243A can be allotted to Hobbs in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Mexican concurrence has been received because Hobbs is located within 320 kilometers (199 miles) of the U.S.-Mexican border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Hobbs, New Mexico	231C1, 239C2, 243A, 275C

4. The window period for filing applications will open on **June 4, 1991**, and close on **July 5, 1991**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Petitioner's comments were late filed but were accompanied by a request for their acceptance. Petitioner states that a copy of the *Notice* was not received because of the relocation of its offices. Because the proceeding is uncontested, we will accept petitioner's late filed comments for the purpose of expressing continuing interest.

[2] The coordinates for Channel 243A at Hobbs are North Latitude 32-42-00 and West Longitude 103-07-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-307

In the Matter of

Amendment of Section 73.202(b), RM-7297
Table of Allotments,
FM Broadcast Stations.
(South Waverly, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 3, 1991; Released: April 18, 1991

By the Chief, Allocations Branch:

1. At the request of Kevin M. Fitzgerald ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 5 FCC Rcd 3733 (1990), proposing the allotment of Channel 241A to South Waverly, Pennsylvania, as the community's first local FM transmission service. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 241A to South Waverly, Pennsylvania, because it could provide the community with its first local FM transmission service. Channel 241A can be allotted to South Waverly in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.3 kilometers (7.0 miles) west to avoid a short-spacing to Station WFLR-FM, Channel 240A, Dundee, New York, and Station WPEL-FM, Channel 243B, Montrose, Pennsylvania.[1] Canadian concurrence has been received because South Waverly is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
South Waverly, Pennsylvania	241A

4. The window period for filing applications will open on **June 4, 1991**, and close on **July 5, 1991**.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 241A at South Waverly are North Latitude 41-59-46 and West Longitude 76-40-26. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants for Channel 241A at South Waverly may avail themselves of the provisions of Section 73.213(c)(1) with respect to Station WFLR-FM, Channel 240A, Dundee, New York.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-113

In the Matter of

Amendment of Section 73.606(b), RM-7643
Table of Allotments,
TV Broadcast Stations.
(Los Angeles and Norwalk,
California)

NOTICE OF PROPOSED RULE MAKING

Adopted: April 8, 1991; Released: April 19, 1991

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Fidelity Television, Inc. (petitioner), licensee of Station KCAL-TV, Channel 9, Norwalk, California, requesting the reallotment of its channel to Los Angeles, California, and modification of its license accordingly.[1]

2. In support of its proposal, petitioner asserts that the reallotment of Channel 9 from Norwalk to Los Angeles would more effectively serve the public interest by fulfilling the goals of the *Sixth Report and Order*, 41 FCC 148 (1952), which established the use of VHF channels to provide area-wide service in large cities. Additionally, petitioner asserts that the Review Board's determination in *RKO General, Inc.* (" *RKO* "), 5 FCC 2d 517 (1966), that Norwalk, a suburb of Los Angeles, is not independent of the latter community for purposes of Section 307(b), indicates that an evaluation of the allotment priorities required to implement Section 1.420(i) has previously been determined.

3. We believe petitioner's proposal warrants consideration. As we noted in *Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License* (*Memorandum Opinion and Order)*, 5 FCC Rcd 7094 (1990), the Commission prohibits removal of a community's sole local transmission service, except in rare circumstances in which a waiver of this prohibition may be justified. We also noted that in instances in which a petitioner proposes to reallot a channel from a rural community to a community within the Urbanized Area of another community, we would question whether the proposed community of license is deserving of a first local service preference, or whether the proposed community should be credited with all the services authorized in the Urbanized Area. In this instance, Norwalk and Los Angeles are both within the Los Angeles Urbanized Area as defined by the United States Census. Although petitioner proposes to remove the sole local television transmission service from Norwalk, removal of this service will not result in a net loss or a net gain of television transmission service in the Los Angeles Urbanized Area. Therefore, this proposal is distinguishable from instances in which a licensee may seek to remove the sole local transmission service from a distant suburb in order to reallot that channel to a neighboring Urbanized Area. This view is further supported by the fact that the Commission's Review Board, in the context of a comparative hearing involving this channel, denied a request to include a Section 307(b) issue concerning the licensing of the channel to either Norwalk or Los Angeles, stating that "there is no indication that a meaningful 307(b) choice between Los Angeles and Norwalk could be made." *RKO* at 5 FCC Rcd 519.

4. A staff engineering analysis confirms that VHF television Channel 9 can be reallotted to Los Angeles consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules.[2] Furthermore, this proposal is not precluded by the Commission's *Order* in *Advanced Television Systems and Their Impact on Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987.

5. In view of the above, we believe that the public interest may be served by the reallotment of Channel 9 from Norwalk to Los Angeles, California, as this action would provide Los Angeles with an additional television broadcast service without depriving the Los Angeles Urbanized Area of a first local television transmission service. We also propose to modify the license of Station KCAL-TV to specify Los Angeles as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in the use of VHF television Channel 9 at Los Angeles.

6. Accordingly, we seek comments on the proposed amendment to the Television Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Los Angeles, California	2,4,5,7,11, 13,22,*28,34, *58-,*68-	2,4,5,7,9,11, 13,22,*28,34,*58-, *68-
Norwalk, California	9	--

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard E. Wiley, Esq.
John C. Quale, Esq.
Jerry V. Haines, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The Television Table of Allotments was recently modified to reflect the allotment of Channel 9 to Norwalk, its community of license, rather than Los Angeles. *See Order*, 6 FCC Rcd 30 (1991).

[2] The transmitter for Station KCAL-TV is located at coordinates 34-13-38 and 118-04-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-114

In the Matter of

Amendment of Section 73.202(b), RM-7457
Table of Allotments,
FM Broadcast Stations.
(Othello, East Wenatchee,
and Cashmere, Washington
and Wallace, Idaho)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: April 5, 1991; Released: April 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by P-N-P Broadcasting, Inc. ("petitioner"), permittee of Station KZLN-FM Othello, Washington, requesting the substitution of Channel 248C1 for Channel 248C2 at Othello, and the modification of Station KZLN-FM's construction permit to operate on the higher powered channel.[1] In order to accommodate the request, petitioner also seeks the substitution of Channel 266A in lieu of Channel 249A at East Wenatchee, Washington, and the modification of Station KYSN's license to specify the alternate channel; the substitution of Channel 294A for Channel 266A at Cashmere, Washington, and the modification of Station KZPH's construction permit to specify the alternate channel;[2] and the downgrade of vacant and unapplied for Channel 248C at Wallace, Idaho, to Channel 248C2. Petitioner states that it will apply for Channel 248C1 and Othello, if allotted, and will reimburse the licensee of Station KYSN for reasonable costs associated with the change at East Wenatchee.[3]

2. We believe the public interest would be served by proposing the substitution of Channel 248C1 for Channel 248C2 at Othello, the substitution of Channel 266A in lieu of 249A at East Wenatchee, the substitution of Channel 294A for Channel 266A at Cashmere, and the downgrade of Channel 248C at Wallace to Channel 248C2, since it could provide Othello with a wide coverage area FM service. Channel 248C1 can be allotted to Othello in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.0 kilometers (8.7 miles) southwest to avoid a shortspacing to the proposed allotment on Channel 247A at Davenport, Washington.[4] Channel 266A can be allotted to East Wenatchee at Station KYSN's licensed site, with a site restriction of 4.1 kilometers (2.6 miles) south to avoid a short-spacing to Station KEYF(FM), Channel 266C, Cheney, Washington.[5] Channel 294A can be allotted to Cashmere at the site specified in Station KZPH's construction permit, with a site restriction of 4.2 kilometers (2.6 miles) west to avoid a short-spacing to Station KKNW, Channel 295C1, Bremerton, Washington.[6] Channel 248C can be downgraded to Channel 248C2 at Wallace, Idaho, with a site restriction of 1.3 kilometers (0.8 miles) northeast to avoid a short-spacing to Station KISC, Channel 251C at Spokane, Washington.[7] In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 248C1 at Othello or require the petitioner to demonstrate the availability of an additional equivalent class channel. Canadian concurrence in the allotments is required since Othello, East Wenatchee, Cashmere and Wallace are located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Whenever an existing licensee or permittee is ordered to change frequencies in order to accommodate a new channel allotment, Commission policy requires the benefitting party to reimburse the affected station for costs incurred. In this instance, petitioner stated its willingness to reimburse Station KYSN for its reasonable costs incurred in moving to Channel 266A at East Wenatchee. However, since Station KZPH was accorded permittee status prior to the adoption of this *Notice*, it is also entitled to reimbursement for the reasonable and prudent costs associated with the requested frequency change. Petitioner is requested to state its willingness to reimburse Station KZPH for the reasonable costs to be incurred in moving to Channel 294A at Cashmere.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Othello, Washington	248C2	248C1
East Wenatchee, Washington	249A	266A
Cashmere, Washington	266A	294A
Wallace, Idaho	248C, 264C	248C2, 264C

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Stephenson Broadcasting, Inc., licensee of Station KYSN, Channel 249A, East Wenatchee, Washington ("KYSN"), and Upper Valley Broadcasting Corporation, permittee of Station KZPH, Channel 266A, Cashmere, Washington ("KZPH"), SHALL SHOW CAUSE why their authorizations SHOULD NOT BE MODIFIED to specify operation on Channels 266A and 294A, respectively, proposed herein instead of their presently authorized Channels 249A and 266A, respectively.

6. Pursuant to Section 1.87 of the Commission's Rules, KYSN and KZPH may, not later than **June 10, 1991,** file written statements showing with particularity why their license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KYSN and/or KZPH to furnish additional information. If KYSN and/or KZPH raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, KYSN and/or KZPH will be deemed to

have consented to the modification as proposed in the *Order to Show Cause and a final Order* will be issued by the Commission, if the abovementioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KYSN and the permittee of Station KZPH, as follows:

Stephenson Broadcasting, Inc.
960 Valley Mall Parkway
East Wenatchee, Washington 98802
Upper Valley Broadcasting Corp.
P.O. Box 523
Leavenworth, Washington 98826

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **June 10, 1991,** and reply comments on or before **June 25, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the following:

Duane J. Polich, President
P-N-P Broadcasting, Inc.
P.O. Box 2869
Othello, Washington 99344-2869
(Petitioner)

Edward B. Cohen, Esq.
1752 N Street, N.W., #800
Washington, D.C. 20036
(Counsel to Station KSYN)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The petitioner subsequently filed an application to downgrade its construction permit to operate on Channel 248C3 in lieu of Channel 248C2. This request was granted on March 25, 1991.

[2] When this petition was filed, Channel 266A at Cashmere was vacant but applied for. Upper Valley Broadcasting Corporation (BPH-870908MB) subsequently received a construction permit for the channel.

[3] We note that an opposition to this proposal was jointly filed by Robert C. LaBonte, former licensee of Station KYSN(FM), East Wenatchee, Washington, and present licensee Stephenson Broadcasting, Inc. This opposition will be considered in conjunction with the ultimate resolution of this proceeding.

[4] The coordinates for Channel 248C1 at Othello are North Latitude 46-45-28 and West Longitude 119-19-10.

[5] The coordinates of Channel 266A at East Wenatchee are North Latitude 47-22-52 and West Longitude 120-17-16.

[6] The coordinates for Channel 294A at Cashmere are North Latitude 47-30-35 and West Longitude 120-31-24.

[7] The coordinates for Channel 248C2 at Wallace are North Latitude 47-28-40 and West Longitude 115-54-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-643

In the Matter of

Amendment of Section 73.202(b), RM-7579
Table of Allotments,
FM Broadcast Stations.
(Columbia, Illinois)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 8, 1991; Released: April 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 6 FCC Rcd 103 (1991), issued in response to a petition for rule making filed by WCBW, Inc. ("petitioner"), licensee of Station WCBW(FM), Channel 285A, Columbia, Illinois, proposing the substitution of Channel 285C3 for Channel 285A at Columbia, and modification of its license to specify the higher powered channel. Petitioner filed comments restating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 285C3 for Channel 285A at Columbia, since it could provide a wide coverage area FM service to the community. Channel 285C3 can be allotted to Columbia in compliance with the Commission's minimum distance separation requirements with a site restriction of 18.2 kilometers (11.3 miles) northwest of the community.[1] The site restriction is necessary in order to avoid a short spacing to a construction permit for Station WQHC(FM), Channel 284A, Nashville, Illinois. In accordance with Section 1.420(g) of the Commission's Rules, we are herein modifying the license of Station WCBW(FM) to specify operation on Channel 285C3 in lieu of Channel 285A at Columbia, Illinois. The substitution at Columbia is contingent on Station WTAO(FM), Murphysboro, Illinois, moving to Channel 286B1 as ordered in MM Docket No. 89-526.[2] Therefore, issuance of a construction permit or a license to cover the construction permit for Channel 285C3 at Columbia may be withheld until Station WTAO(FM) is licensed on its new channel.

3. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
Columbia, Illinois	285C3

4. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WCBW, Inc, for Station WCBW(FM), Columbia, Illinois, IS MODIFIED, to specify operation on Channel 285C3 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 285C3 at Columbia are North Latitude 38-34-24 and West Longitude 90-19-30.

[2] A *Report and Order* was adopted on June 8, 1990, in MM Docket 89-526, granting the substitution of Channel 286B1 for Channel 285A at Murphysboro, Illinois. This action became effective August 6, 1990. *See* 5 FCC Rcd 3776 (1990). An application (BPH-901210IF) to implement the upgrade on Channel 286B1 at Murphysboro, Illinois, is pending.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-500

In the Matter of

Amendment of Section 73.202(b), RM-6970
Table of Allotments,
FM Broadcast Stations.
(Stephenson, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 8, 1991; Released: April 19, 1991

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8139 (1989), issued in response to a petition filed by Pacer Radio of the Near-North (formerly Stephenson Radio Company) ("petitioner"). Petitioner requested the substitution of Channel 272C2 for vacant Channel 272A at Stephenson, Michigan. Petitioner filed comments restating its intention to file an application for Channel 272C2.[1] WinCom Wisconsin Limited Partnership ("WinCom") filed comments and a counterproposal.[2]

2. The *Notice* proposed the substitution of Channel 272C2 for vacant Channel 272A at Stephenson, Michigan. The channel could be allotted with a site restriction of 19.7 kilometers (12.2 miles) north of the community to prevent short-spacings to Station WQTC-FM, Channel 272A, Manitawoc, Wisconsin, and Station WRVM, Channel 274C1, Suring, Wisconsin.

3. WinCom, licensee of Station WKFX(FM), Kaukauna, Wisconsin, and the proponent of an upgrade for Station WKFX(FM) from Channel 285A to Channel 276C3, has proposed the allotment of Channel 272C3 to Kaukauna as an additional equivalent Class C3 channel to accommodate other expressions of interest in the new Class C3 channel sought by WinCom. *See* 4 FCC Rcd 8002 (1989). Channel 272C3 at Kaukauna is short spaced to Channel 272C2 at Stephenson. WinCom, in an attempt to alleviate the conflict, has proposed the allotment of Channel 292C2 to Stephenson in lieu of the proposed Channel 272C2. WinCom requests that the Commission either consolidate the instant proceeding with the Kaukauna proceeding or not decide the Stephenson proceeding in a manner that would preclude the use of Channel 272C3 as an additional allotment for Kaukauna.

4. Petitioner continues to support the allotment of Channel 272C2 to Stephenson, Michigan. According to petitioner, WinCom's proposal to allot Channel 292C2 to Stephenson in lieu of Channel 272C2 is not acceptable as filed regardless of the outcome of the pending proceedings. Petitioner argues that Commission policy does not provide for the acceptance of contingent proposals elsewhere based on speculative resolutions of pending proceedings.

5. Based on the above information, we believe the public interest would be served by the allotment of a Class C2 channel to Stephenson, Michigan. Although petitioner requested the substitution of Channel 272C2 for Channel 272A at Stephenson, we believe the allotment of Channel 292C2 in order to provide the community with a wide coverage area FM service would best serve the public interest. The allotment of Channel 292C2 in lieu of Channel 272C2 will eliminate any possible conflict with the Kaukauna proceeding, allow the timely resolution of this proceeding, and allow the C2 allotment of a channel to Stephenson without a site restriction. [3] Since Stephenson is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been obtained. In accordance with the *Notice*, we will delete Channel 272A at Stephenson.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **June 3, 1991,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Stephenson, Michigan	292C2

7. The window period for filing applications for Channel 292C2 at Stephenson will open on **June 4, 1991,** and close on **July 5, 1991.**

8. IT IS FURTHER ORDERED, That the counterproposal filed by WinCom Wisconsin Limited Partnership is DISMISSED.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In addition, petitioner filed an application for Channel 272A at Stephenson on December 27, 1989, (891227MI) which was returned on January 30, 1990. A second application filed by petitioner on January 2, 1990, (900102MK) was returned on June 5, 1990. In each instance, petitioner was the sole applicant for the channel.

[2] Although we have accepted the comments filed by WinCom Wisconsin Limited Partnership, the counterproposal will be dismissed in this proceeding and considered in MM Docket 89-486.

[3] The coordinates for Channel 292C2 are 45-24-54 and 87-36-24.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-285

In the Matter of

Amendment of Section 73.202(b), RM-7235
Table of Allotments,
FM Broadcast Stations.
(Hannibal, Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: April 8, 1991; Released: April 19, 1991

By the Chief, Allocations Branch:

1. At the request of Seven Ranges Radio Company, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3315 (1990), proposing the allotment of Channel 258A to Hannibal, Ohio, as its first local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. The *Notice* requested the petitioner to provide sufficient information to demonstrate that Hannibal has social, economic or cultural indicia to qualify it as a "community" for allotment purposes because Hannibal is not listed in the U.S. Census or incorporated. In support of its proposal, petitioner states that Hannibal, with a population of 650 persons according to the 1988 Rand McNally Commercial Atlas, is located in Monroe County and has its own post office and zip code. It goes on to state that there are several local businesses, including two large aluminum processing plants (Ormet Corporation and Conalco). River High School, which draws students from a 25 mile area, and an elementary school are also located in Hannibal. Petitioner states that there is a Methodist church, the Hannibal Garden Center, the Ormet Credit Union, a county park and public pool in Hannibal. Petitioner submits that the commercial district is not in Hannibal, but is in the Steelton area of New Martinsville. However, it states that most "serious" shopping is done in St. Clairsville, Ohio. Nevertheless, petitioner contends that the lack of commercial outlets is not relevant to the allotment process, citing *Westover and Grafton, West Virginia*, 46 FR 10737, February 2, 1981, and *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). Finally, petitioner states that Hannibal is located within the civil division of Ohio Township but requests that the allotment be made to Hannibal rather than to Ohio Township because there are two other Ohio Townships in the state. Petitioner recognizes that there are no official civil boundaries but states that the Hannibal Lock and Dam is the center of what most people would recognize as the town of Hannibal. Further, petitioner contends that it has located two transmitter sites which will cover all of Ohio Township with a city grade or better signal.

3. Based upon the showing submitted by petitioner, we do not believe that Hannibal is a community for allotment purposes. Hannibal is not listed in the 1980 U.S. Census or incorporated. In addition, petitioner has not shown other indicia of community status such as political, social, or business organizations, or provided the testimony of local residents. It appears that there is no local government. With the exception of the Hannibal Garden Center, petitioner has not specifically identified any businesses or other organizations which identify themselves with Hannibal or shown that these organizations are intended to serve the needs of Hannibal as opposed to other areas. There are no community organizations, such as a Chamber of Commerce, Rotary Club or Lions Club. Road maintenance and other similar services are provided by Ohio Township, police protection is provided by Monroe County and fire and emergency medical services are provided by a volunteer fire department in the nearby community of Sardis. Hannibal is served by an unnamed water and sewer district that also serves Sardis. Hannibal and Sardis also apparently share a telephone exchange. In the past, we have rejected claims of community status where a connection has not been shown between political, social and commercial organizations and the community in question. *See Gretna, Marianna, Quincy and Tallahassee, Florida*, 6 FCC Rcd 633 (1991) and cases cited therein. We recognize that the 1988 Rand McNally Commercial Atlas lists Hannibal with a population of 650 persons. However, as stated in the *Notice*, mere geographical location is not sufficient to establish "community" status. *See Vimville, Mississippi*, 48 FR 5974 (1983). Furthermore, the presence of a post office and a zip code is not sufficient to establish community status. *See Coker, Alabama*, 43 R.R. 2d 190 (1978).

4. Accordingly, IT IS ORDERED, That the petition of Seven Ranges Radio Company, Inc. (RM-7235) IS DENIED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Andrew J. Rhodes
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 91-112

In the Matter of

Amendment of Part 90 Revising Authorized Bandwidths in the 24.05-24.25 GHz and 33.4-36.0 GHz Frequency Bands — RM-7317

NOTICE OF PROPOSED RULE MAKING

Adopted: April 4, 1991; Released: April 18, 1991

By the Commission:

I. INTRODUCTION

1. The Commission has before it a Petition for Rule Making (Petition) filed by Applied Concepts, Inc. (Applied Concepts), on February 26, 1990.[1] Applied Concepts requests that Section 90.209(b)(6) of our Rules, 47 C.F.R § 90.209(b)(6), be amended to revise the maximum authorized bandwidth limitation in the frequency bands above 16,000 MHz (16 GHz).[2] Comments on the Petition were filed by Harris Corporation, Farinon Division (Harris), and Digital Microwave Corporation (DMC). No reply comments were filed. By this *Notice of Proposed Rule Making*, we propose to amend Section 90.209(b)(6) by removing the current bandwidth limitations. In lieu thereof, we will permit the bandwidths in the frequency bands above 16 GHz to be authorized on a case-by-case basis.

II. PETITION

2. Applied Concepts requests that Section 90.209(b)(6) be amended to indicate that the maximum authorized bandwidth for frequencies above 16 GHz shall be specified in the station authorization. [3] Applied Concepts argues that the frequency spectrum above 16 GHz can be used for many diverse applications, some of which are not feasible within a 50 MHz bandwidth limitation. Applied Concepts further states that a single arbitrarily-chosen bandwidth is unlikely to accommodate all new requirements and could result in repeated rule amendments. Applied Concepts concludes that until such time as greater utilization of the frequency bands above 16 GHz creates a need for a more structured allocation, decisions as to an appropriate maximum authorized bandwidth should be left to the Commission's licensing staff.[4]

3. As a basis for its petition, Applied Concepts states that it is in the process of developing a speed-measuring doppler radar for law enforcement purposes that would operate in the 33.4-36.0 GHz band, but that the present 50 MHz bandwidth limitation precludes employing certain spread spectrum techniques that would make its equipment undetectable by radar detectors. Applied Concepts further states that it believes that the general public interest would be better served by its proposed broad amendment of Section 90.209(b)(6). Alternatively, it states that its interests could also be served by an amendment that would permit up to a 1 GHz authorized bandwidth in the 33.4-36.0 GHz band for transmitters with output powers of 0.1 watt or less. In comments on the Petition, Harris and DMC argue that Section 90.209(b)(6) of the Rules has become obsolete due to previous Commission actions and should be deleted from the Rules.[5]

III. DISCUSSION

4. Frequencies in the Radiolocation Service are used in equipment designed to determine distance, speed, direction, or position for purposes other than navigation. There is increasing interest in the use of radio modulation techniques employing wideband technology. The state of the art is changing rapidly in this area, and in many cases the current bandwidth limitations could hinder the development of equipment using unique design concepts. The 24.05-24.25 GHz and 33.4-36.0 GHz bands are ideally suited for equipment using wideband technology. In its petition, Applied Concepts asserts that the present 50 MHz bandwidth limitation specified in Section 90.209(b)(6) for these two bands can be restrictive when wideband technology such as spread spectrum is contemplated. We concur with this statement and conclude that the current 50 MHz bandwidth limitation is unnecessarily restrictive. We also concur that adopting any finite bandwidth at this time for these two frequency bands could result in future rule changes or waiver requests as different uses for frequencies in the bands are developed. Accordingly, in addition to updating the Rules, we believe it will be in the public interest to allow the development of equipment that would increase the use of frequencies in these two bands. Therefore, to permit licensees greater flexibility in the use of the 24.05-24.25 GHz and 33.4-36.0 GHz frequency bands, we are proposing to amend Section 90.209(b)(6) as shown in the Appendix to state that the maximum authorized bandwidth in the 24.05-24.25 GHz and 33.4-36.0 GHz bands, as listed in Section 90.103(b) for the Radiolocation Service, will be specified in the station authorization.

5. Section 90.209(b)(6) also specifies bandwidth of 25 MHz for the 10.55-10.68 GHz band. This limitation was adopted in 1975.[6] In 1981, the 10.55-10.68 GHz band was re-allocated from Part 90 to Part 21 with the provisions that no new Part 90 operations would be authorized in this band.[7] In 1983, frequencies in the 10.55-10.68 GHz band were also made available for Digital Termination Systems use under Part 94 of the Rules.[8] Because the 10.55-10.68 GHz band is no longer available to new Part 90 licensees, rather than deleting the reference to this band as suggested by Harris and DMC, we propose to clarify that the maximum authorized bandwidth specified in § 90.209(b)(6) for the 10.55-10.68 GHz band applies only to systems grandfathered under that Part.

6. We believe the proposed rule amendment will enhance the utility of the frequencies in question and request comments on the proposal.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

Reason for action

7. The Commission is proposing this rule change to remove the bandwidth restriction for equipment operating in the 24.05-24.25 GHz and 33.4-36.0 GHz frequency bands. This action will permit licensees greater flexibility in the use of the private land mobile radio spectrum.

Legal basis

8. The proposed amendments to the Commission's Rules, as set forth in the attached Appendix, are issued under the authority contained in Sections 4(i), 303(g), 303(r), and 332(a) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 303(g), 303(r), and 332(a).

Reporting, recordkeeping and other compliance requirements

9. None.

Federal rules which overlap, duplicate or conflict with this rule

10. None.

Description, potential impact, and number of small entities involved

11. This rule change will result in a greater variety of equipment being available to potential users of frequencies in the 24.05-24.25 GHz and 33.4-36.0 GHz bands. The number of small entities that will be involved is unknown.

Any significant alternatives minimizing the impact on small entities and consistent with the stated objectives

12. None.

PAPERWORK REDUCTION ACT STATEMENT

13. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or recordkeeping, labeling, disclosure or record retention requirements, and will not increase burden hours imposed upon the public.

IV. PROCEDURAL MATTERS

14. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* 47 C.F.R. § 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. 47 C.F.R. § 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. 47 C.F.R. § 1.1203.

15. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. 47 C.F.R. § 1.1202(b). Any person who submits a written *ex parte* presentation shall provide on the same day it is submitted two copies of same under separate cover to the Commission's Secretary for inclusion in the public record. The presentation (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding(s) to which it relates and the fact that two copies of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation.

16. Any person who in making an oral *ex parte* presentation presents data or arguments not already reflected in that person's written comments, memoranda, or filings in that proceeding shall provide on the day of the oral presentation an original and one copy of a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. The memorandum (as well as any transmittal letter) must clearly indicate on its face the docket number of the particular proceeding and the fact that an original and one copy of it have been submitted to the Secretary, and must be labeled or captioned as an *ex parte* presentation. 47 C.F.R. § 1.1206.

17. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commissions Rules, interested parties may file comments on or before **July 2, 1991,** and reply comments on or before **August 1, 1991.** Extensions of time to file comments or replies are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting material. If participants want each Commissioner to receive a personal copy of their comments an original plus nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20554.

18. Authority for issuance of this *Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

It is proposed to amend 47 C.F.R. Part 90 as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303, unless otherwise noted:

2. 47 C.F.R. § 90.209 is amended by revising paragraph (b)(6) to read as follows:

§ 90.209 **Bandwidth limitations.**

* * * * *

(b) * * *

(6) The authorized bandwidth for assignments in the 24,050 to 24,250 MHz and 33,400 to 36,000 MHz frequency bands listed in § 90.103 of this part shall be specified in the station authorization. Stations authorized in the 10,550-10,680 MHz band under this Part prior to April 17, 1981, will retain their initial bandwidth authorization.

* * * * *

FOOTNOTES

[1] The Petition for Rule Making was placed on Public Notice March 15, 1990.

[2] Section 90.209(b)(6) currently specifies that the maximum authorized bandwidth is 25 MHz in the frequency band 10.55-10.68 GHz and 50 MHz in the frequency bands above 16 GHz. The frequency band 10.55-10.86 GHz is no longer available to new Part 90 licensees. Two frequency bands above 16 GHz, 24.05-24.25 GHz and 33.4-36.0 GHz, are available for Part 90 Radiolocation Service use pursuant to Section 90.103(b).

[3] Petition at 1.

[4] Petition at 2.

[5] Harris Comments at 2 and DMC Comments at 2.

[6] In May 1975, identical rule sections §§ 89.107(e), 91.104(e), and 93.104(e) were adopted in Docket 19869, 52 FCC 2d 894 (1975). In November 1978, these sections were consolidated into § 90.209(b)(6) when Parts 89, 91, and 93 were combined into Part 90 by action in Docket 21348, 69 FCC 2d 1612 (1978) and 43 FR 54788 (November 22, 1978).

[7] *First Report and Order*, Gen. Docket No. 79-188, 86 FCC 2d 360 (1981).

[8] *Second Report and Order*, Gen. Docket No. 79-188, 54 RR 2d 1091 (1983).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-400

In re Applications of

MABLETON BROADCASTING COMPANY, INC.	File No. BPH-870706ML
GONZALES BROADCASTING, INC.	File No. BPH-870707MJ
BOLTON BROADCASTING, LIMITED	File No. BPH-870710MD
VOTH BROADCASTING COMPANY	File No. BPH-870710MF
RADIO MABLETON LIMITED	File No. BPH-870710MT
METROPOLITAN MANAGEMENT CORPORATION	File No. BPH-870710MY
LORENZO JELKS	File No. BPH-870710MZ
QRW PARTNERS LIMITED PARTNERSHIP	File No. BPH-870710NF
MABLETON COMMUNICATIONS, LIMITED	File No. BPH-870710NQ

For a Construction Permit for a New FM Station on Channel 273A, Mableton, Georgia

ORDER

Adopted: April 3, 1991; Released: April 19, 1991

By the Commission:

1. The Review Board remanded this proceeding for additional hearings with respect to the qualifications of four of the applicants. *Mableton Broadcasting Company, Inc.*, 5 FCC Rcd 2474 (Rev. Bd. 1990). On remand, the ALJ determined that, although no evidence would be taken with respect to Mableton Broadcasting Company's (MBC) application, he expected MBC "to fully participate in the remand hearing. . . ." *Mableton Broadcasting Company*, FCC 90M-3657 ¶ 4 (ALJ Nov. 19, 1990). Now before the Commission is a Re-Directed Petition for Declaratory ruling filed February 4, 1991 by MBC. MBC asks the Commission to rule pursuant to 47 C.F.R. § 1.2 that the ALJ lacked authority to direct MBC to fully participate in the remanded hearing.[1]

2. MBC argues that its application was not subject to remand, that it has neither the burden of proof nor the burden of proceeding with respect to any of the applications, and that its required participation would be extremely burdensome. It concludes that under the circumstances of this proceeding the ALJ lacked authority to compel its participation in the remanded proceeding. MBC further asserts that it did not pursue an interlocutory appeal under 47 C.F.R. § 1.301 because the question of its participation in the proceeding is not one that would require a remand if reversed at the time of a final decision. Therefore, according to MBC, no purpose would have been served by following the procedures of Section 1.301.

3. Although MBC asserts that it is requesting a declaratory ruling under Section 1.2, its pleading effectively seeks reversal of an interlocutory order of the ALJ and thus it constitutes an appeal governed by Section § 1.301. Under these circumstances, and because consideration of MBC's pleading under Section 1.2 would significantly undermine the limitations on frivolous interlocutory appeals, MBC's arguments that it should not be subject to the provisions of Section 1.301 are without merit. In this regard, the ALJ's ruling does not limit MBC's right to participate in the hearing or otherwise provide a basis for an appeal as a matter of right under Section 1.301(a). Moreover, MBC has not requested leave from the ALJ to appeal his order as required by Section 1.301(b). Nor has it requested a waiver of Section 1.301 or shown that a waiver of the limitation on interlocutory appeals is warranted. Thus, MBC's Re-Directed Petition is procedurally defective and will be dismissed.

4. In any event, MBC has not cited any authority supporting its argument that the ALJ acted improperly. The Board remanded the entire proceeding, including MBC's application to the ALJ. 5 FCC Rcd at 6326 ¶ 45. In this situation the ALJ has broad authority to conduct the proceedings and no showing has been made that the ALJ's determination requiring MBC's participation was an abuse of his discretion to regulate the course of the proceeding. *See* 47 C.F.R. § 1.243.

5. ACCORDINGLY, IT IS ORDERED, That the Re-Directed Petition for Declaratory Ruling filed February 4, 1991 by Mableton Broadcasting Company IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] MBC previously asked the Review Board for a similar declaratory ruling. The Board dismissed MBC's request, holding, *inter alia*, that it lacked authority to make declaratory rulings under Section 1.2. *Mableton Broadcasting Company*, FCC 91R-3 (Rev. Bd. Jan. 23, 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petitions for Declaratory Ruling Regarding Reversionary and Security Interests	MMB File No. 910221A MMB File No. 870921A

ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: April 10, 1991; Released: April 11, 1991

By the Chief, Mass Media Bureau:

1. By Public Notice comment has been sought on a request filed by the law firm of Hogan & Hartson for a declaratory ruling that lenders may take a limited security interest in an FCC license and on a related request filed by the law firm of Crowell & Moring, seeking a declaratory ruling regarding the phrase "right of reversion in the license" in Section 73.1150(a) of the Commission's Rules. Comments were due April 15, 1991 and reply comments April 30, 1991.

2. The law firm of Latham & Watkins has requested a one-week extension of time in which to file comments. As counsel to numerous commercial banks and investment firms that finance broadcast properties, Latham and Watkins is in the position to provide the Commission with a broad analysis of the issues raised by these petitions. Thus, affording additional time to file comments may significantly increase the quality and scope of the data and analysis submitted to the Commission. We will therefore extend the deadline for filing initial comments as requested and will do so for both proceedings because of their related nature.

3. ACCORDINGLY IT IS ORDERED that the time for filing comments and reply comments in MMB File No. 910221A and MMB File No. 870921A ARE EXTENDED to **April 22, 1991**, and **May 7, 1991**, respectively.

5. This action is taken pursuant to authority found in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, and Sections 0.204(b), 0.283, and 1.46 of the Commission's Rules.

6. For further information concerning this proceeding, contact Kathleen O'Brien Ham, Policy and Rules Division, Mass Media Bureau, (202) 632-7792.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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